

ENTERED

F 2302

San Francisco Law Library

436 CITY HALL


No. 159422

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

4

E!

15.2908

No. 14327

**In the United States Court of Appeals
for the Ninth Circuit**

**JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, APPELLANT**

v.

HAROLD S. ANDERSON, JR., ET AL., APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION**

BRIEF FOR APPELLANT

STUART ROTHMAN,

Solicitor,

BESSIE MARGOLIN,

Chief of Appellate Litigation,

WILLIAM W. WATSON,

Attorney,

United States Department of Labor,

Washington 25, D. C.

KENNETH C. ROBERTSON,

Regional Attorney.

FILED

OCT 23 1954

**PAUL P. O'BRIEN
CLERK**

INDEX

	Page
Statement of jurisdiction.....	1
Statement of the case.....	2
Specification of errors.....	10
Summary of argument.....	11
Argument:	
Appellees' employees employed in the operation of the mess-hall and lodging facilities for the employees at Anaconda Company's Darwin mine are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.....	15
Conclusion.....	37
Appendix.....	38

CITATIONS

Cases:

<i>Armour & Co. v. Wontock</i> , 323 U. S. 126, rehearing denied, 323 U. S. 818.....	19
<i>Bodden v. McCormick Shipping Corp.</i> , 188 F. 2d 773.....	20
<i>Broach v. McPherson</i> , 248 S. W. 2d 355.....	14, 36
<i>Consolidated Timber Co. v. Womack</i> , 132 F. 2d 101.....	12, 16, 22, 32, 35
<i>General Electric Co. v. Porter</i> , 208 F. 2d 805, certiorari denied, 347 U. S. 951.....	13, 25, 35, 36
<i>Hanson v. Lagerstrom</i> , 133 F. 2d 120.....	12, 24, 28, 33, 35
<i>Hawkins v. E. I. DuPont De Nemours & Co.</i> , 192 F. 2d 294.....	16, 27, 36
<i>Jax Beer Co. v. Redfern</i> , 124 F. 2d 172.....	20
<i>Kam Koon Wan v. E. E. Black, Limited</i> , 188 F. 2d 558, certiorari denied, 342 U. S. 826.....	13, 20
<i>Kirschbaum Co. v. Walling</i> , 316 U. S. 517.....	16, 17, 24, 28, 33, 37
<i>Lewis v. Florida Power & Light Co.</i> , 154 F. 2d 751.....	20
<i>McComb v. Row River Lumber Company</i> , 8 WH Cases 403.....	22
<i>McLeod v. Threlkeld</i> , 319 U. S. 491.....	20
<i>Mabee v. White Plains Pub. Co.</i> , 327 U. S. 178.....	20
<i>Overnight Motor Transp. Co. v. Missell</i> , 316 U. S. 572.....	16
<i>Overstreet v. North Shore Corp.</i> , 318 U. S. 125.....	12, 20
<i>Phillips v. Graham Aviation Co.</i> , 157 F. 2d 443.....	20
<i>Russel Co. v. McComb</i> , 187 F. 2d 524.....	36
<i>St. Johns River Shipbuilding Co. v. Adams</i> , 164 F. 2d 1012.....	20
<i>Swift & Co. v. Wilkinson</i> , 124 F. 2d 176.....	20
<i>Tipton v. Bearl Sprott Co.</i> , 93 F. Supp. 496.....	18, 19, 20
<i>Tipton v. Bearl Sprott Co.</i> , 175 F. 2d 432.....	18
<i>Tobin v. Cherry River Boom & Lumber Co.</i> , 102 F. Supp. 763.....	14, 36, 37
<i>Tobin v. Promersberger</i> , 104 F. Supp. 314.....	14, 36
<i>Tobin v. Union Nat. Bank of Little Rock</i> , 207 F. 2d 848.....	14, 36

Cases—Continued

	Page
<i>Walling v. Helmerich and Payne</i> , 323 U. S. 37.....	16
<i>Walling v. Jacksonville Paper Co.</i> , 317 U. S. 564.....	12, 20
<i>Walling v. Sondock</i> , 132 F. 2d 77, certiorari denied, 318 U. S. 772..	20
<i>Wilson v. Reconstruction Finance Corporation</i> , 158 F. 2d 564, certiorari denied, 331 U. S. 810.....	20

Federal Statutes:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as
amended by the Act of Oct. 26, 1949, c. 736, 63 Stat. 910, 29
U. S. C. (1952 ed.) 201 *et seq.*:

Section 3 (j)	10, 13, 14, 16, 25, 26, 28, 38
Section 6	12
Section 7	12, 38
Section 11 (c)	16, 39
Section 13 (a) (1)	2, 3
Section 13 (a) (2)	2, 8
Section 15 (a) (2)	1, 39
Section 15 (a) (5)	1, 39
Section 17	1, 2, 39

Miscellaneous:

29 CFR, 1953 Supp., 516	16
Interpretative Bulletin issued May 1950 by Wage and Hour Administrator, Title 29, Ch. V, Code of Federal Regulations, Part 776, Subpart A, 15 F. R. 2925	29
Statement of the Majority of the House Conferees:	
95 Cong. Rec. 14929	15, 28, 33, 34
95 Cong. Rec. 14936	14, 29
95 Cong. Rec. 14942	28
Statement of the Majority of the Senate Conferees, 95 Cong. Rec. 14874	14, 15, 28, 31, 34
28 U. S. C. Sections 1291 and 1294 (1)	2
28 U. S. C. Sections 1337 and 1345	2

In the United States Court of Appeals for the Ninth Circuit

No. 14327

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR, APPELLANT

v.

HAROLD S. ANDERSON, JR., ET AL., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Central Division, dismissing an action by the Secretary of Labor,¹ United States Department of Labor, filed under Section 17 of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by c. 736, 63 Stat. 910, 29 U. S. C. (1952 ed.), 201 *et seq.*, to restrain appellee from violating Sections 15 (a) (2) and 15 (a) (5) of the Act.²

¹ By order of the District Court entered October 15, 1953 (R. 51), James P. Mitchell, Secretary of Labor, was substituted for Martin P. Durkin, resigned.

² The pertinent statutory provisions are printed in full in the Appendix, *infra*, p. 38.

After a full hearing, the court made "Findings of Fact and Conclusions of Law" (R. 52-74), and entered final judgment on January 18, 1954 (R. 76). Notice of Appeal to this court was filed on March 18, 1954 (R. 77).

As set forth in the complaint (R. 3), the district court had jurisdiction under Section 17 of the Act and 28 U. S. C. Sections 1337 and 1345. This court has jurisdiction to determine the appeal under 28 U. S. C. Sections 1291 and 1294 (1).

STATEMENT OF THE CASE

The complaint (R. 3-7) alleges violations of the Act's overtime and record-keeping provisions. The only question raised by this appeal is whether, in providing meals and lodging to the employees of the Anaconda Company's Darwin mine admittedly engaged in the production of goods for commerce (Stip. R. 15-16), appellee's employees are themselves engaged in such production within the meaning of the Fair Labor Standards Act. Appellee also contended in the court below that its employees were exempt from the requirements of the Act by virtue of the exemptions provided by Sections 13 (a) (1) and 13 (a) (2) (Stip. R. 30, 31). However, the court below limited its factual findings to the coverage issue (Findings and Conclusions R. 52-74). Thus, while appellee's Designation of Additional Parts of the Record indicates an intention to present to this Court the issues concerning the applicability of the exemptions, we do not believe that these issues are presented for decision on this appeal.

Appellees operate three establishments providing dining and lodging facilities in various localities in California, each under contract with a commercial company. The main office is in West Los Angeles, California. The employees here involved are employed by appellees in operating the messhall, bunkhouse and commissary facilities owned by the Anaconda Copper Mining Company and located on certain of its property at its Darwin mine (Fdg. 1, R. 53). These facilities accommodate employees of Anaconda engaged in the mining and milling of lead, silver and zinc ores, which ores are regularly shipped in interstate commerce (Stip., R. 15, 16).

Approximately 11 employees of appellees are regularly employed in the operation of the messhall, bunkhouse, and commissary in such occupations as cooks, dishwashers, waiters and janitors (Fdgs. 1 and 17, R. 53, 66). The parties agree that the commissary clerk is not within the coverage of the Act and that the manager of the facilities is within the exemption provided by Section 13 (a) (1) of the Act (Fdg. 17, R. 66). The janitors, waiters and wishwashers receive \$40.25 per week; the second cook receives \$61.46 a week, and the Chef receives \$90.93 per week. In addition, all employees are furnished free board and lodging (Fdg. 17, R. 66-68). The employees normally work 56 hours per week. While they indicate on a daily time record sheet the days upon which they report for work, no specific record of hours worked as such is maintained (Fdg. 13, R. 63). All pay is computed on the basis of the number of days worked during the payroll period (Fdg. 14, R. 63).

The Darwin mine is located in a remote and isolated area in the Inyo Mountains near Death Valley, California (Plaintiff's Exhibit Z, R. 50).³ There are no eating and lodging facilities at the mine other than those maintained by appellees who hold an exclusive franchise to furnish such services (Plf. Exh. B, R. 41). Nor are there any other living facilities in the vicinity at which these employees might be accommodated. The nearest town which could possibly approximate their needs is Lone Pine, located approximately 38 miles from the mine (Fdg. 11, R. 62, 63). While the town of Darwin, population 125, is one mile from the mine, its facilities could hardly be considered adequate for this purpose. This village contains a service station, a grocery store, a post office and two eating establishments. One of the eating establishments, the Darwin Café, is closed on Thursday and is never open for business before 10:00 a. m. While at the time the stipulation was entered into this establishment served such items as steak and bacon and eggs (Fdg. 7, R. 59, 60), on cross-examination of Mr. Fred Tong, general manager of the Darwin mine, it was revealed that it is now under a new management which confines itself to serving ham sandwiches and chili while the refreshment bar is open (R. 147). The number of persons which can be accommodated at one time is extremely limited (Plf. Exhs. H and I).⁴ The other restaurant,

³ Abbreviated hereinafter as "Plf. Exh."

⁴ By stipulation of the parties and order of this Court it was agreed that the photographic exhibits of record may be referred to in their original form and that the Court dispense with their reproduction in the printed record.

known as Crosson's, sells hamburgers, chili and beans, sandwiches, and similar items. This establishment contains a counter, six or seven stools and two tables (Fdg. 7, R. 59, 60). The towns of Keeler (Fdg. 9, R. 62), population 150, Panamint Springs (Fdg. 10, R. 62), population 12, and Olancho (Fdg. 8, R. 61), population 200, located at distances of 23, 23, and 34 miles respectively, likewise obviously lack facilities with which to accommodate the miners.

No public transportation facilities are available between the Anaconda mine and any of the surrounding communities; the chief mode of transportation being by private automobile. While a contract carrier of ore operates runs between the town of Lone Pine, the other communities, and the mine, only two additional persons may ride in the cab with the driver (Fdg. 6, R. 58, 59).

The Government offered the testimony of two "underground" Anaconda employees which further attested to the remoteness of the Anaconda mine and the resulting essentiality of appellee's facilities to its operation. Thus, Mr. Kenneth Dodd stated unequivocally "I couldn't possibly be an employee for Anaconda without the bunkhouse" (R. 91). Mr. Paul Allen's testimony was to the same effect. He testified that he utilized appellees' facilities simply because there were no other available rooming houses or restaurants nearby (R. 94, 95). That there were no other adequate facilities available was also indicated by the testimony of Mr. Charles Snyder, an Anaconda employee called on behalf of appellee, who, after admitting that

he did not know of any available living facilities, stated if pressed “* * * I believe I might be able to set up a wigwam or teepee” (R. 112).

Prior to November 1, 1945, the facilities here involved were operated by the Anaconda Co. (Fdg. 2, R. 54). On that date a “subsistence agreement” was entered into between Anaconda and appellees, as successful bidders, providing for the operation of these facilities by appellees. On October 1, 1946, a further agreement was entered into which, with one amendment (Fdg. 2, R. 54), is still in effect (Fdg. 4, R. 57). It is clear that under the terms of the agreement, the Anaconda Company has retained effective control over the operation of the facilities and that they are closely integrated with the production of the mine. Thus, it stipulates the charges to be made for board and lodging and requires the operator to serve wholesome daily meals as directed by the Company. Meals are paid for by means of payroll deductions (Plf. Exh. B, R. 42). Employee grievances or dissatisfaction as to the food served are taken up with Anaconda, not with appellees (R. 96, 97, 98). The contract contains certain provisions designed to protect Anaconda, including a requirement that the operator procure liability insurance covering the Anaconda Company as well as appellees (Plf. Exh. B, R. 45). Appellees are granted the exclusive privilege of conducting “subsistence operations” at the Darwin mine during the continuance of the agreement which may be terminated upon 30 days’ written notice by either party (Plf. Exh. B, R. 41). The facilities, including the messhall, bunkhouse, commissary, light, heat, fuel,

telephone service, etc., are furnished to appellees free of charge. Anaconda also supplied the initial requirements of blankets, sheets, china and glassware, and other similar items without cost. Appellees are guaranteed a gross profit of \$750 each and every month (exclusive of overhead charges attributable to this operation incurred by appellees' home office in Los Angeles) (Plf. Exhs. A and B, R. 32-37, 38-48). The cost to Anaconda has averaged approximately \$0.30 per meal (Fdg. 16, R. 64-65).

Of the 236 persons employed by Anaconda, an average of 62 (or almost 26 percent) reside in the bunkhouse and 49 (or almost 20 percent) regularly avail themselves of the messhall facilities (Fdg. 3, R. 55, 56). In addition, men who do not reside at the bunkhouse are occasionally served at the messhall (Fdg. 3, R. 56). Approximately half of Anaconda's 126 miners and underground workers live in the bunkhouse (R. 140), the use of which is limited to male employees of Anaconda who are either single or whose families reside outside the Anaconda area (Fdg. 5, R. 58). While the Anaconda Company also owns some houses and trailers which it rents to employees, these are, in the main, occupied by the mill workers who are generally family men and whose employment, unlike that of the miners, is of a stable nature (R. 140).

That the operation of appellees' facilities is closely integrated with the production operations of the mine is indicated by the fact that meal times are adjusted principally to accommodate the needs of the employees of Anaconda whose mine operates on a two-shift basis

and whose mill operates on a three-shift basis (Fdg. 3, R. 57). Employees working in the mine who cannot practically leave the working area eat their lunches at their place of work (Fdg. 15, R. 64). Approximately 20 to 25 percent of the meals served by appellees consist of box lunches (Plf. Exh. C, R. 49). To a very limited extent and only incidentally does the messhall serve outsiders (Fdg. 1, R. 53). There are no signs indicating that the messhall is an eating establishment (R. 85) and appellees do no highway advertising of their facilities (Fdg. 5, R. 57). Indeed, a sign on one of the access roads to the Anaconda properties warns "children and unauthorized persons" to "keep out" (Plf. Exh. 1, R. 86). Of significance also is the fact that in its help-wanted advertising for mill men and miners, Anaconda makes a point of noting that "good bunkhouse accommodations" are available (Plf. Exh. AA, R. 51) which admittedly are an inducement in securing employees (R. 128, 129).

The trial court made no findings with respect to appellees' claim of exemption as a retail establishment under Section 13 (a) (2) of the Act. Appellee introduced only one witness, Mr. Arnim Kussurum, Secretary of the National Restaurant Association on this issue. Mr. Kussurum testified that the Anderson operation falls within the Association's definition of "restaurant" as defined in the Association's bylaws; that establishments such as appellees' qualify for membership in the Association, and that "in the restaurant industry a retail sale is a sale or service of a meal to the consumer, and generally consumed on the

premises of the establishment" (R. 154). Under this definition he stated that the function performed by the Anderson facility would be considered retail sales or services (R. 156). It was brought out on cross-examination that in addition to his duties as secretary, Mr. Kussurum also acts as the Association's general counsel and had corresponded with appellees in connection with the instant case (R. 156).

On the basis of "expert" testimony introduced by appellees (R. 114-139) the trial court made findings that persons employed in mining operations will live in communities at a distance of 30 or 40 miles from their places of work and will commute daily by automobile, bus, or other means of transportation; that abandonment or curtailment of facilities similar to those operated by appellees by mining companies situated like the Anaconda mine did not affect either the production of the mine or availability of employees; that children of persons employed at Anaconda attend high school in Lone Pine, commuting daily by bus; and that employees frequently will leave appellees' facilities and obtain their lodging and their meals elsewhere without affecting their employment with Anaconda. The court further speculated that should the facilities in question be abandoned or curtailed entirely, there would be only a temporary inconvenience to the operation of the mine and the effect upon production at the mine would be insubstantial even during this temporary period with no significant effect upon total shipments, particularly in view of the stocks of ore that are kept in reserve. The court concluded that appellees' facilities are maintained for

Anaconda employees as a convenience only. The court also speculated that if the curtailment or abandonment of these facilities compelled as many as one-half of the employees utilizing these facilities to leave their jobs, that such employees would obtain meals and lodging in the homes of other employees and in surrounding communities which "would in all probability respond to an increased demand" (Fdgs. 18-27, R. 68-73). The court concluded that none of appellees' employees were engaged in commerce, the production of goods for commerce, or in any closely related process or occupation directly essential to such production within the meaning of the Fair Labor Standards Act (R. 73-74). Accordingly, the court denied appellant's prayer for injunction and dismissed the complaint (R. 75).

SPECIFICATION OF ERRORS

1. The trial court erred in making Findings of Fact Nos. 19, 20, 21, 22, 23, 24 and 25 (R. 68-73) to the effect that appellees' facilities are not remote and isolated, that food and lodging can be obtained elsewhere in the vicinity, and that abandonment of the facilities would result only in a temporary inconvenience to the mine rather than substantially affecting its production.

2. The trial court erred in making Conclusions of Law Nos. 1, 2, 3 and 4 (R. 73, 74) to the effect that appellees' employees are not engaged in activities which are closely related and directly essential to the production of goods for commerce within the meaning of Section 3 (j) of the Act.

3. The lower court erred in failing to find as a fact that, in providing meals and lodging to employees of the Anaconda Copper Mining Company's Darwin mine admittedly engaged in the production of goods for commerce, appellees' employees are themselves engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

4. The lower court erred in failing to conclude as a matter of law, that appellees' employees are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

5. The lower court erred in failing to conclude, as a matter of law, that appellees have violated, and are violating, the overtime compensation and record-keeping provisions of the Fair Labor Standards Act with respect to employees employed by them in operation of the Anaconda Copper Mining Company's Darwin mine eating and lodging facilities.

6. The lower court erred in dismissing the complaint and in failing to grant the injunction prayed for in the complaint.

SUMMARY OF ARGUMENT

The holding of the court below that the Anaconda Company's Darwin mine is not sufficiently remote and isolated to bring appellees' employees engaged in the feeding and lodging operations at the mine within the coverage of the Act is erroneous and not sustained by the record. The stipulated facts indicate that the Darwin mine is located near Death Valley in one of the most remote and isolated parts of the country.

The nearest lodging and eating facilities which could possibly accommodate adequately the needs of the miners is located some 38 miles away from the mine. The trial court theorized, however, that were appellees' facilities to shut down, the surrounding communities would expand their facilities to meet the needs of the miners. This Court expressly rejected a similar argument in *Consolidated Timber Co. v. Womack*, 132 F. 2d 101, 107 stating “* * * it is not what could have been the fact, but what actually was the fact, upon which the decision must rest.” It then held, on the basis of a factual situation closely paralleling that of the instant case, that employees of the cookhouses serving the loggers were within the coverage of the Act. To the same effect is the Eighth Circuit's decision in *Hanson v. Lagerstrom*, 133 F. 2d 120.

The only distinction which might be drawn between the instant case and the *Womack* case is that in *Womack* the cookhouses were operated by the employer of the logging crews whereas here the facilities are provided through an independent contractor. But this distinction is immaterial since as the decisions of this Court and of the Supreme Court have repeatedly held, the applicability of Sections 6 and 7 of the Act depends on the type of work of the individual employee rather than on the business of his employer. See *Kirschbaum Co. v. Walling*, 316 U. S. 517; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Overstreet v. North Shore Corp.*, 318 U. S. 125;

Kam Koon Wan v. E. E. Black, Limited, 188 F. 2d 558 (C. A. 9), certiorari denied, 342 U. S. 826.

That the test of coverage under Section 3 (j) of the Act is not whether the work of the employees is indispensable to production was only recently stated by this Court in *General Electric Co. v. Porter*, 208 F. 2d 805 certiorari denied, 347 U. S. 951, holding the Act applicable to firemen employed by the General Electric Company to protect a community in which company employees lived. The work of the employees in the instant case engaged in providing essential living facilities for the miners is just as closely related and directly essential to production as the work of the firemen in the *General Electric Co.* case.

That the *Womack* and *Hanson* cases, and the case of *Kirschbaum Co. v. Walling*, 316 U. S. 517, upon which those decisions relied, are still controlling and authoritative was made clear beyond doubt in the legislative reports on the 1949 amendments of the Act.

Section 3 (j) as amended in 1949 (printed in full in the Appendix, *infra*, p. 38), provides that an employee shall be deemed engaged in the production of goods "if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof * * *.*" The italicized words were substituted for the phrase formerly contained in this section "or in any process or occupation necessary to the production thereof * * *."

In *Hawkins v. E. I. du Pont de Nemours & Co.*, 192 F. 2d 294 (C. A. 4), the only court of appeals decision interpreting the amended language of the Act in connection with employees of industrial feeding facilities, the Fourth Circuit held the Act applicable to employees of a cafeteria located in a plant engaged in the production of goods for commerce, analogizing the situation to that of the isolated lumber and mining camps.

See also *Tobin v. Promersberger*, 104 F. Supp. 314 (D. Minn., 1952); *Tobin v. Cherry River Boom & Lumber Co.*, 102 F. Supp. 763 (S. D. West Virginia, 1952); *Broach v. McPherson*, 248 S. W. 2d 355 (S. Ct. of Arkansas, 1952); *Tobin v. Union Nat. Bank of Little Rock*, 207 F. 2d 848 (C. A. 8).

The legislative history of the amended Section 3 (j) specifically indicates that the change in the definition of produced was not intended to exclude from the Act cookhouse employees of the type involved in the *Womack* and *Hanson* cases. This is made clear (1) by rejection of the word "indispensable" as being too restrictive (95 Cong. Rec. 14874, October 18, 1949; 95 Cong. Rec. 14936, October 18, 1949), (2) by express approval of the *Womack* and *Hanson* cases in the Report of the Majority of the Senate Conferees (95 Cong. Rec. 14874, October 18, 1949); (3) by the choice of language virtually identical to the Supreme Court's language in *Kirschbaum* (95 Cong. Rec. 14874, October 18, 1949), and (4) by statements in both branches expressly approving the *Kirschbaum* case

(95 Cong. Rec. 14929, October 18, 1949, 95 Cong. Rec. 14874-5, October 18, 1949).

Nor is it material under the amendments that services such as these are provided through an independent contractor. For the legislative reports on the amendments clearly state that the work of these employees “* * * will remain subject to the Act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce.” (95 Cong. Rec. 14929, October 18, 1949; see also 95 Cong. Rec. 14874-5, October 18, 1949).

ARGUMENT

Appellees' employees employed in the operation of the mess-hall and lodging facilities for the employees at Anaconda Company's Darwin mine are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act

Employees of the Anaconda Company at the Darwin mine are indisputably engaged in the mining and milling of lead, silver and zinc ores which are regularly shipped in interstate commerce (Stip., R. 15, 16). While appellees apparently concede this much, they dispute the applicability of the Act to their own employees who are engaged in providing essential board and lodging facilities for employees at the mine (Stip., R. 30).⁵ It is the Government's contention that Sec-

⁵ There is no disputed issue concerning non-compliance with the requirements of the Act. Though the answer (R. 12, 13) denies generally paragraphs V, VI, and VII of the complaint alleging failure to maintain proper records and to pay proper overtime compensation to employees engaged in the production of goods for commerce, it is plain from the stipulated pre-

tion 3 (j), which defines “produced” to include employees engaged in “any closely related process or occupation directly essential to the production” of goods, as well as those performing enumerated activities on the goods themselves, embraces the employees here involved.

This Court’s decision in *Consolidated Timber Co. v. Womack*, 132 F. 2d 101, (C. A. 9) together with the Supreme Court’s decision in *Kirschbaum Co. v. Walling*, 316 U. S. 517, and the Fourth Circuit’s decision in *Hawkins v. E. I. du Pont de Nemours & Co.*, 192 F. 2d 294, decided subsequent to the recent amendments to the Act are controlling here. The *Womack* case is indistinguishable from the instant case in fundamental facts and basic principle. Defendant there maintained two cookhouses, one of which was located in an isolated logging camp about 17 miles from the company’s headquarters at Glenwood, Oregon, and the other was situated at defendant’s headquarters in Glenwood. There, as in the case of the messhall

trial conference order that appellees’ denial went only to the allegations of coverage since the pretrial order specifies the coverage and exemption issues but does not list any issue as to whether proper records were maintained or whether the employees were properly paid. In any event appellees admit that no specific record of hours worked is maintained as required by the regulations issued by the Administrator, 29 CFR, 1953 supp., 516 pursuant to the authority conferred upon him by Section 11 (c) of the Act (Stip. 13, R. 25). Furthermore, the facts show a customary 56-hour workweek for an agreed salary based on a daily wage without the slightest suggestion of extra pay for overtime (Fds. 13 and 14, R. 63). That the Act requires more for the employees to whom it applies in such situations is clear from the decisions in *Overnight Motor Transp. Co. v. Missell*, 316 U. S. 572 and *Walling v. Helmerich and Payne*, 323 U. S. 37.

and lodging facilities here, the cookhouses were maintained primarily for the purpose of serving employees engaged in the production of goods for commerce. In a suit by the Cookees at the two cookhouses for unpaid overtime compensation, defendant contended that the employees were not covered by the Act. Rejecting defendant's contention that the cookhouse employees were not necessary to the production of timber for commerce, this Court said (*id.* at 105):

The employees * * * were actually assisting the work of the loggers by keeping their board close to their place of work, thus rendering it easier (perhaps, even possible) for Consolidated to maintain a proper organization of its loggers and forwarding their work by furnishing the food whereby the men were given the strength to pursue their labors. And, in our determination, we find ourselves well within the limitations—the lines drawn—in * * * *Kirschbaum v. Walling*.

The only distinction which might be drawn between this case and the *Womack* case is that in *Womack* the cookhouses were operated by the employer of the logging crews whereas here the facilities are provided through an independent contractor. But this distinction is plainly immaterial since the applicability of Sections 6 and 7 of the Act depends on the type of work of the individual employee rather than on the business of his employer. Thus, in *Kirschbaum Co. v. Walling*, 316 U. S. 517, the Supreme Court held the Act applicable to employees engaged in the maintenance and operation of a building, because its ten-

ants were engaged in the production of goods for commerce, stating:

* * * The petitioners assert, however, that the building industry of which they are a part is purely local in nature and that the Act does not apply where the employer is not himself engaged in an industry partaking of interstate commerce. But the provisions of the Act expressly make its application dependent upon the character of the employees' activities (*id.* at 524).

And in *Tipton v. Bearl Sprott Co.*, 175 F. 2d 432 (C. A. 9), a case involving employees of an independent contractor employed in the operation of a cafeteria located in a steel company, this Court recognized this well-settled principle, stating:

In order to state a claim against appellees upon which relief could be granted, it was not necessary to allege that appellees, or any of them, were engaged in the production of goods for commerce; for the applicability of § 7 (a) of the Act, 29 U. S. C. A. § 207 (a), is determined, not by the nature of the employer's business, but by the character of the employee's activities * * * (*id.* at 435).

While upon remand the district court rendered a decision in favor of the defendants dismissing the complaint (*Tipton v. Bearl Sprott Co.*, 93 F. Supp. 496), the facts upon which that decision turned are clearly distinguishable from those in the instant case. There, in striking contrast to the remoteness of the lodging and dining facilities in the instant case, the steel company in which the in-plant feeding opera-

tions were carried on, was located in the main downtown central business and shopping district of the City of Torrance, Los Angeles County, in the midst of the most crowded and active business center of the city. The City of Torrance contained 23 restaurants, of which more than two-thirds were within a quarter of a mile of an entrance to the steel plant. While it is true that the district court in the *Tipton* case also attached some significance to the fact that the cafeteria was operated by an independent contractor, clearly it regarded this as only one element to be considered in conjunction with all the other facts in determining whether the test set forth in *Armour & Co. v. Wontock*, 323 U. S. 126, rehearing denied 323 U. S. 818, was met, i. e. whether the employment is "part of an integrated effort for the production of goods" for commerce, 323 U. S. at 130.

In the instant case the integration of the lodging and feeding facilities with Anaconda's mining operations is immediately evident from the fact that prior to 1945 Anaconda operated these facilities itself and from the fact of appellees' contract with the Anaconda Company under which it retains effective control over these operations. Thus, under the terms of the "subsistence agreement" the mess hall, bunkhouse, commissary and light, heat, fuel and telephone service are furnished to appellees free of charge. Anaconda also supplied the initial requirements of blankets, sheets, china and glassware, and other similar items without cost. Appellees are guaranteed a gross profit of \$750 each month (Plf. Exhs. A and B, R. 32-37, 38-48). The cost to Anaconda has averaged approxi-

mately \$0.30 per meal (Fdg. 16, R. 64, 65). The terms of the "subsistence agreement" further stipulate the charge to be made for board and lodging and require the operator to serve wholesome daily meals as directed by the Company (Plf. Exh. B, R. 42). Meals are paid for by means of payroll deductions (Plf. Exh. B, R. 42). Employee grievances or dissatisfaction as to the food served are taken up with Anaconda rather than with appellees (R. 96-98).

This Court's continued recognition that coverage under the Act is dependent upon the character of the employees' activities, and not upon the nature of the employer's business, is evident from its more recent decision in *Kam Koon Wan v. E. E. Black, Limited*, 188 F. 2d 558, certiorari denied, 342 U. S. 826 (decided April 13, 1951, i. e. subsequent to the district court's decision in *Tipton v. Bearl Sprott Co.* which was decided in October, 1950). The decisions of the Supreme Court and other courts of appeal to this effect are so numerous⁶ as to require no further comment.

The trial court's conclusion in the instant case that adequate housing and eating facilities were presently

⁶ *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Overstreet v. North Shore Corp.*, 318 U. S. 125 at 132; *McLeod v. Threlkeld*, 319 U. S. 491 at 497; *Mabee v. White Plains Pub. Co.*, 327 U. S. 178, at 184-185; *St. Johns River Shipbuilding Co. v. Adams*, 164 F. 2d 1012, 1014; *Bodden v. McCormick Shipping Corp.*, 188 F. 2d 773, at 775; *Wilson v. Reconstruction Finance Corporation*, 158 F. 2d 564 at 565, certiorari denied, 331 U. S. 810; *Walling v. Sondock*, 132 F. 2d 77 at 78, certiorari denied, 318 U. S. 772; *Phillips v. Graham Aviation Co.*, 157 F. 2d 443 at 444; *Lewis v. Florida Power & Light Co.*, 154 F. 2d 751 at 752; *Swift & Co. v. Wilkinson*, 124 F. 2d 176 at 176-177; *Jax Beer Co. v. Redfern*, 124 F. 2d. 172 at 174.

available within a reasonable distance of the mine and that appellees' facilities are not sufficiently remote and isolated to bring their employees within the coverage of the Act (Fdg. 20, R. 69) is conclusively contradicted by the stipulated facts and by its own findings. The nearest town, Darwin, with a population of 125, is located about one mile from the mine. While there are two eating establishments in Darwin, it is evident that neither of these operate facilities adequate for feeding the miners. The Darwin Café is closed on Thursday and is never open for business before 10:00 a. m. (Fdg. 7, R. 59, 60). The number of persons which this establishment can accommodate at one time is obviously limited far below the requirements of the miners (Plfs. Exhs. H and I). And while at the time the stipulation was entered into this establishment served such items as steak and bacon and eggs (Fdg. 7, R. 59, 60), on cross-examination of Mr. Fred Tong, general manager of the Darwin mine, it was revealed that it is now under a new management which confines its operations to serving ham sandwiches and chili while the refreshment bar is open (R. 147).

The only other eating establishment in Darwin, known as Crossons, limits itself to selling such items as hamburgers, chili and beans, and sandwiches, obviously not adequate fare for miners. It contains a counter, six or seven stools and two tables (Fdg. 7, R. 59, 60). The nearest lodging accommodations consist of a motel in Panamint Springs, a distance of 23 miles from the mine. The per day rate for accommodations is \$4.00 single and \$5.50 double (Fdg. 10, R. 62)

which would certainly preclude the ordinary miner from making the motel his home. Under these circumstances the following statement by this Court in the *Womack* case (132 F. 2d at 107) would seem particularly apt here:

* * * The argument that because the Glenwood cookhouse is situated in a village wherein is also located a lunch counter or fountain equipped with a half dozen stools, serving sandwiches and coffee, is not persuasive. No such establishment could supply the necessary meals required by several hundred hungry laborers.

And in the *Womack* case, the cookhouse was no more remote and isolated than are appellees' facilities here. There, as here, employees of the Company were not compelled to take their meals at the messhall, and there the trial court had found that the greater proportion of the Company employees took their meals elsewhere than at the Glenwood cookhouse. Many of these employees lived in Glenwood and ate at home. In the instant case there are no eating and lodging facilities at the mine other than those maintained by appellees who hold an exclusive franchise to furnish such services (Plf. Exh. B, R. 41).

Similarly, in *McComb v. Row River Lumber Company* (not officially reported), 8 WH Cases 403, (D. Ore., 1948) affirmed in a per curiam opinion by this Court at 180 F. 2d 356, the court, although dismissing the complaint on other grounds, held a cook and a kitchen helper to be within the coverage of the Act where employed at a lumber camp located only 13 miles from the town of Cottage Grove, Oregon, which

contained public eating places. There the Company employed an average of 167 employees in its lumbering operations, and a monthly average of 53 of these employees availed themselves of the cookhouse. There also the Company paid the cook a subsidy for each meal served; the purpose of which, as found by the trial court, was to offer reasonably priced meals as an inducement to attract and retain employees to work at its mill (8 WH Cases 404).

An average of 62 (or approximately 26 percent) of the 236 persons employed by Anaconda reside in appellees' bunkhouse and an average of 49 (or about 20 percent) regularly avail themselves of the messhall facilities (Fdg. 3, R. 56). Of especial importance here is the fact that approximately 50 percent of Anaconda's 126 miners and underground workers live in these facilities (R. 140). The nearest town containing appropriate facilities is Lone Pine which is located about 38 miles from Darwin. The trial court, however, cited instances where persons have lived 30 or 40 miles from their place of work and theorized that if appellees abandoned the facilities in question, restaurants in Darwin would expand their facilities to meet the increased demand (Fdg. 20, R. 69; R. 164). But a similar argument was advanced in the *Womack* case where the Company urged that it could have employed loggers in the vicinity which would have obviated the necessity of providing a cookhouse. This Court made short shrift of that argument by stating "it is not what could have been the fact, but what actually was the fact, upon which the decision must rest" (132 F. 2d at 107). Similarly, in *Hanson v.*

Lagerstrom, 133 F. 2d 120, the Eighth Circuit held the Act applicable to a cookhouse employee at a logging camp although located only 13 miles from the towns of Little Falls and Big Falls, Minnesota, whose eating and lodging facilities might have been adequate for the needs of loggers. Said the court (at p. 122):

The proximity of hotels at Little Falls and Big Falls, Minnesota, the presence of a highway running past the camp within 150 feet, and other roads kept open the year around, with many men owning cars of their own, are cited as indicating the non-essential character of the cook house. It is also said that the cost of production is the same whether the camp method is used or farmers and shackers are hired. But these suggestions are aside from the question. The fact that defendant might have employed other methods, thus avoiding the necessity of maintaining a cook house, is not important. We are here "confronted with a condition and not a theory." We must confine our consideration to what was actually done and not to what might have been done.

The basis for holding coverage of the cookhouse employees in both the *Womack* and *Hanson* cases was that such employment plainly falls within the criteria established by the Supreme Court in *Kirschbaum Co. v. Walling*, 316 U. S. 517. In that case the Act was held applicable to maintenance workers employed by the owner of a loft building tenanted by manufacturers producing goods for commerce. Rejecting the criterion of physical contact with the goods as the touchstone of coverage, the Court ruled that unless the

employee's activity has "only the most tenuous relation" to production, coverage may not be denied (*id.* at 525).

Unless economic realities are to be ignored, appellees' employees here are no less important to the Anaconda mining operations than were Kirschbaum's maintenance employees to the garment manufacturing conducted in its building. The operation of lodging and messhall facilities such as those of appellees plays a significant, integral part in the successful operation of mining camps. That camp conditions, particularly satisfactory living accommodations are an important factor in attracting and retaining an adequate supply of labor, is underscored by Anaconda's own advertisement for recruiting mill men and miners which makes a particular point of noting that "good bunk-house accommodations" are available (Plf. Exh. AA, R. 51) and the fact that it subsidizes the operation of these facilities (Fdg. 16, R. 64, 65). And appellees' expert witness testified that the availability of such accommodations obviously provides a stronger likelihood that Anaconda would obtain employees (R. 128, 129).

In view of the circumstances of this case it would appear that the lower court adopted the test that coverage under Section 3 (j) depends upon whether the employment is indispensable to production. But this Court expressly refuted this test in its recent decision in *General Electric Co. v. Porter*, 208 F. 2d 805 certiorari denied 347 U. S. 951, a case involving the employment of firemen by the General Electric

Company to protect a community in which company employees resided, stating:

The employees' work need not be indispensable to production * * *. It may be argued that the communities were not indispensable to plant operation. Yet they serve a valuable function and in the event they were destroyed by fire the smooth functioning of the plant would be interrupted. (208 F. 2d at 809-810, 811).

The furnishing of board and lodging facilities in the instant case is just as closely related and directly essential to production as the furnishing of firemen to guard the community in that case.

Thus, it is clear that the instant case is indistinguishable from the *Womack* and *Hanson* cases. Though the operation of the lodging and messhall facilities here was conducted by an independent contractor, the above Supreme Court and appellate court decisions, together with the fact that the courts in the *Womack* and *Hanson* cases expressly relied on *Kirschbaum*, establish that that factor is not material.

That the *Womack*, *Hanson* and *Kirschbaum* cases are still controlling and authoritative was made clear beyond doubt in the legislative reports on the 1949 amendments to the Act. And the court decisions since the amendments recognize and confirm their continued authoritative effect.

Section 3 (j) as amended in 1949 (printed in full in the Appendix, *infra*, p. 38), provides that an employee shall be deemed engaged in the production of

goods “if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof* * * *.” The italicized words were substituted for the phrase formerly contained in this section “or in any process or occupation necessary to the production thereof * * *.”

The only court of appeals decision interpreting the amended language of the Act in connection with the furnishing of food to employees engaged in the production of goods for commerce is found in *Hawkins v. E. I. du Pont de Nemours & Co.*, 192 F. 2d 294 (C. A. 4, 1951). There the Fourth Circuit held the Act applicable to employees of a cafeteria located in a plant engaged in the production of goods for commerce where the cafeteria was the only available place for employees to eat. The court analogized this situation to that of the isolated mining or lumber camp in *Womack*, stating:

* * * But we find no substantial distinction between the conditions surrounding the cafeteria workers in the defendant's plant and those relating to cooks and similar workers in isolated mining or lumber camps mentioned in the bulletin. All of the employees of the defendant were confined to the plant under guard during their working hours, and hence it may fairly be said that the activities of the cafeteria employees were closely related and directly essential to the production of merchandise (*id.* at 297).

That the Fourth Circuit correctly decided that the 1949 amendments did not revoke the principles of the *Womack*, *Hanson* and *Kirschbaum* cases is clear for the legislative history of the amended Section 3 (j) plainly shows that the change was not designed to cause any severe restriction of the scope of the Act as previously construed by the courts, but, rather “to provide a more specific guide than does the word ‘necessary’ ” to prevent extension of the Act “to employees of an enterprise purely local in nature who may incidentally perform some work having a remote or tenuous relationship to the operations of a producer of goods for interstate commerce.” Statement of the Majority of the Senate Conferees, 95 Cong. Rec. 14874, October 18, 1949. As stated by Representative Lesinski, Chairman of the House Committee, “the amended section gives the courts a more specific guide as to the intention of Congress; it does not, however, radically revise the coverage of the Act as it has been interpreted by the courts in the past.” 95 Cong. Rec. 14,942, October 18, 1949.⁷

Specifically, the change in the definition of “produced” was not intended to exclude from the Act cook-house employees of the type involved here and in the

⁷ This is not to state that the 1949 Amendments constituted a blanket endorsement of the previous applications of the Act to the multifarious situations which had confronted the courts. See the Statement of the House Managers which contains an illustrative list of decisions applying the Act to activities which Congress considered “not closely related or directly essential to production.” 95 Cong. Rec. 14929, October 18, 1949. See also Interpretative Bulletin issued May 1950 by the Wage and Hour Administrator

Womack and *Hanson* cases. This is made clear (1) by rejection of the word “indispensable” as being too restrictive,⁸ (2) by express approval of the *Womack* and *Hanson* cases in the Report of the Majority of the Senate Conferees, (3) by the choice of language, virtually identical to the Supreme Court’s language in *Kirschbaum*, and (4) by statements in both branches of Congress expressly approving the *Kirschbaum* case.

The Report of the Majority of the Senate Conferees makes it clear that employees of the type here involved were not intended to be removed from the protection of the Act. It states:

What is necessary to production has been the subject of litigation in many hundreds of cases in the courts, and varying interpretations of the meaning of the term as applied in particular fact situations may be found in the decisions. The language of the conference agreement should provide more certainty in this field. It adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage. This language is descriptive of activities which, although not an integral part of the productive operations, have a relationship to production which may reasonably be considered close as distinguished from remote and tenuous. Its reference to activities

concerning the general coverage of the amended Act. Title 29, Ch. V, Code of Federal Regulations, Part 776, Subpart A; 15 F. R. 2925.

⁸ 95 Cong. Rec. 14874, October 18, 1949. See also 95 Cong. Rec. 14936, October 18, 1949.

directly essential to production does not, as did the House Bill, require that the activities be indispensable to production. Rather, the conference agreement contemplates activities which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of operations which are part of an integrated effort for the production of goods. Such directly essential activities are to be distinguished from those which are only indirectly essential to production, such as the procurement of land for a new factory or the manufacture of brick for its buildings (95 Cong. Rec. 14874, October 18, 1949).

After pointing out that coverage of a real estate firm's employees could not be predicated on the rental of living quarters to factory workers, the Report continues:

* * * Of course, this does not mean that the language of the conference agreement withdraws from coverage employees engaged in operating or maintaining living facilities for employees of a producer of goods for interstate commerce, in situations where living facilities such as food and lodging are provided as a means of assuring continued and efficient production and the furnishing of such facilities is therefore closely related and directly essential to production, as in *Consolidated Timber v. Womack*, 132 F. 2d 101 (C. A. 9); *Hanson v. Lagerstrom*, 133 F. 2d 180 (C. A. 8); *Basik v. General Motors Corp.* (Mich. Sup. Ct.), 19 N. W. 2d 142. *Ibid.*

The House Conference Report does not mention the above cases, but states:

* * * Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory (*McComb v. Factory Stores*, 81 F. Supp. 403 (N. D. Ohio, 1948)). Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and more direct relationship to the producing, manufacturing, etc. activity * * * (95 Cong. Rec. 14928, October 18, 1949).

A close comparison of the language of these two reports and an appreciation of the Congressional intent to provide a clearer guide for judicial determination plainly reveals the line of distinction to be drawn in this area of industrial feeding. The House Report was concerned with the typical situation where a restaurant is located in a factory, which is substantially indistinguishable from any neighboring restaurant to which factory workers would have access. The Senate Report, on the other hand, specifically contemplated the situation presented here to this Court, "where living facilities such as food and lodging are provided as a means of assuring continued and efficient production" (95 Cong. Rec. 14874, October 18, 1949). An examination of the facts in the instant case leaves little question that the facilities were provided here as a means of assuring continued production. The type of operation here conducted is not that of the "independently owned and operated restaurant

located in a factory” which the House Conference Report referred to as no longer being within the coverage of the Act. The facilities here involved were operated by the Anaconda Company, itself, prior to 1945 (Fdg. 2, R. 54). Under the “subsistence agreement” entered into on that date with appellees, and as amended, the messhall, bunkhouses, light, heat, fuel, and telephone service are furnished to appellees free of charge. Anaconda also supplied the initial requirements of blankets, sheets, china and glassware, and other similar items without cost. In addition, appellees are guaranteed a gross profit of \$750 each month (Plf. Exhs. A and B). Further, the “subsistence agreement” stipulates the charges to be made for board and lodging and requires the operator to serve wholesome daily meals as directed by the Company (Plf. Exh. B, R. 42). Appellees are granted the exclusive privilege of conducting “subsistence operations” at the mine during the continuance of the agreement which may be terminated upon 30 days written notice by either party (Plf. Exh. B, R. 41). Under these circumstances it can hardly be contended that the facilities here in question constitute an “independently owned and operated restaurant.” Rather, one cannot escape the conclusion that the facilities are provided “as a means of assuring continued and efficient production” within the intent of the Senate Conference Report (95 Cong. Rec. 14874, October 18, 1949).

Nor is it material under the amendments that the services are provided through an independent contractor rather than by the interstate producer as was true in the *Womack* case. For the House Managers

stated that employees such as those held covered in *Kirschbaum*, "will remain subject to the Act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce" (95 Cong. Rec. 14929, October 18, 1949). And the Report of the Majority of the Senate Conferencees, after giving specific approval to the *Womack* and *Hanson* decisions and after enumerating several other categories of employees who remain within the coverage of the Act, stated: "* * * The work of such employees is, as a rule, closely related and directly essential to production whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer" (95 Cong. Rec. 14874-5, October 18, 1949).

That the ruling in *Kirschbaum* continues as authoritative under the amended definition was made plain in both branches of Congress. Thus, the Managers on the Part of the House explained in their statement accompanying the Conference Report on the bill as enacted:

The bill as agreed to in conference does not affect the coverage under the Act of employees who repair or maintain buildings in which goods are produced for commerce (*Kirschbaum v. Walling*, 316 U. S. 517) or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce. * * * All the employees mentioned in this paragraph are doing work that is closely related and directly essential to the production of goods for

commerce. (95 Cong. Rec. 14929, October 18, 1949.)

The Report of the Majority of the Senate Conferees also specifically approved the *Kirschbaum* case. Thus, it states:

Typical of the classes of employees whose work is closely related and directly essential to production, within the meaning of Section 3 (j) as amended by the conference agreement, are the following employees performing tasks necessary to effective productive operations of the producer:

* * * * *

2. Employees repairing, maintaining, improving, or enlarging the buildings, equipment or facilities of producers of goods. *Roland Electric Co. v. Walling* (326 U. S. 657); *Kirschbaum v. Walling* (316 U. S. 517); *Walling v. McCrady Construction Co.* (156 F. 2d 932 (C. A. 3)); *Borden Co. v. Borella* (325 U. S. 679); *Walling v. Mid-Continent Pipe Line Co.* (143 F. 2d 308 (C. A. 10)); *Bowie v. Gonzales* (117 F. 2d 11 (C. A. 1)); *Bozant v. Bank of New York* (156 F. 2d 757 (C. A. 2)).

* * * * *

The work of such employees is, as a rule, closely related and directly essential to production whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer (95 Cong. Rec. 14874-5, October 18, 1949).

The work of the cookhouse employees is not unlike that of the maintenance employees in *Kirschbaum*.

Indeed this Court in the *Womack* case and the Eighth Circuit in the *Hanson* case recognized this similarity by basing their decisions squarely on the authority of *Kirschbaum v. Walling*, 316 U. S. 517. And in *General Electric Co. v. Porter*, 208 F. 2d 805 (December 7, 1953) certiorari denied 347 U. S. 951, this Court only recently had occasion to reaffirm its approval of *Kirschbaum*, stating:

* * * In *Borden Company v. Borella*, 1945, 325 U. S. 679, 65 S. Ct. 1223, 89 L. Ed. 1865, the Supreme Court not only reaffirmed its position in the *Kirschbaum* case but extended it (*id.* at 810).

* * * While *Borden Company v. Borella*, 1945, 325 U. S. 679, 65 S. Ct. 1223, 89 L. Ed. 1865, was decided prior to the 1949 amendments to the Act, the logic of that opinion still applies to the instant case. The legislative history, interpretations of the Administrator of the Wage and Hour Division, and court decisions convince us that the employees such as here involved were not removed from the coverage of the Act by the amendments. *Tobin v. Union Nat. Bank of Little Rock*, D. C. Ark. 1953, 112 F. Supp. 702; 15 Federal Register 2925, Section 776.17, 776.18; Statement of the Managers on the Part of the House, H. R. Report No. 1453, 81st Congress, 1st Session, Oct. 17, 1949 (*id.* at 811).

Other court decisions subsequent to the 1949 Amendments have consistently recognized that the coverage of cookhouse employees of the type here involved and maintenance and custodial employees of producers of goods for commerce has remained unchanged. See

Hawkins v. E. I. DuPont de Nemours & Co., 192 F. 2d 294 (C. A. 4, 1951) discussed *supra* at p. 27; *Tobin v. Promersberger*, 104 F. Supp. 314 (D. Minn., 1952); *Tobin v. Cherry River Boom & Lumber Co.*, 102 F. Supp. 763 (S. D. West Virginia, 1952); *Broach v. McPherson*, 248 S. W. 2d 355 (S. Ct. of Arkansas, 1952); *Tobin v. Union Nat. Bank of Little Rock*, 207 F. 2d 848 (C. A. 8); *General Electric Co. v. Porter*, 208 F. 2d 805 (C. A. 9), certiorari denied, 347 U. S. 951; *Russell Co. v. McComb*, 187 F. 2d 524 (C. A. 5).

In the *Promersberger* case, *supra*, which held that operations in logging camps of cooks, cookees, bull cooks, barn boss, watchman, and clerk, were closely related to and directly essential to the production of goods for commerce. The court stated at page 317:

Defendants cite legislative history to the effect that restaurant employees were not intended to be within Section 3 (j) of the Act. But it is obvious that the legislators making the comments cited by defendants were speaking of the usual, common situations, not of those cases which, like the instant case, are not the usual, prevalent variety. The legislative history aptly shows that the principle of *Kirschbaum Co. v. Walling*, *supra*, was not destroyed by the amendment.

* * * * *

The bull cooks of the *Promersberger* camp and the *Johnson* camp also are within the Act in view of their relationships to the cookhouse, and the similarity of their duties to those of some of the employees involved in the *Kirschbaum* case. (*Ibid*)

Similarly, in *Tobin v. Cherry River Boom & Lumber Co.*, *supra*, the court held that cookhouse employees were within the coverage of the Act citing this Court's decision in *Consolidated Timber Co. v. Womack*, 132 F. 2d 101; *Hawkins v. E. I. du Pont de Nemours & Co.*, 192 F. 2d 294; and *Hanson v. Lagerstrom*, 133 F. 2d 120.

It therefore seems overwhelmingly clear that *Womack*, *Hanson* and *Kirschbaum* are still authoritative decisions under the 1949 Amendments of the Act.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

STUART ROTHMAN,
Solicitor,

BESSIE MARGOLIN,
Chief of Appellate Litigation,

WILLIAM W. WATSON,
Attorney,
United States Department of Labor,
Washington 25, D. C.

KENNETH C. ROBERTSON,
Regional Attorney.

OCTOBER 1954.

APPENDIX

STATUTORY PROVISIONS INVOLVED

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S. C. Supp. V, 201 *et seq.*):

Section 3 (j) prior to amendment:

SEC. 3. As used in this Act—

* * * * *

(j) “Produced” means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Section 3 (j) as amended:

SEC. 3. As used in this Act—

* * * * *

(j) “Produced” means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of

his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 11. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * * * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of

the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

No. 14327.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR,

Appellant,

vs.

HAROLD S. ANDERSON, JR., *et al.*,

Appellees.

BRIEF FOR APPELLEES.

GIBSON, DUNN & CRUTCHER,
WILLIAM FRENCH SMITH,
JAMES J. RYAN,

634 South Spring Street,
Los Angeles 14, California,

Attorneys for Appellees.

FILED

NOV 22 1954

PAUL P. O'BRIEN
CLERK

TOPICAL INDEX

	PAGE
Statement of issues.....	1
Statement of facts.....	2
Summary of argument.....	13
Argument.....	15

I.

The Fair Labor Standards Act, as amended, does not cover the activities of appellees' employees. Such employees are not engaged in any closely related process or occupation directly essential to the production of goods for commerce.. 15

A. Section 3(j), particularly in the light of the legislative history preceding its amendment in 1949, excludes appellees' employees from coverage..... 15

B. Even under the law prior to its amendment the act did not cover the activities of appellees' employees..... 28

C. The test to be applied in this case is whether or not the activities of appellees' employees are closely related or directly essential to the production of ore for commerce. The facts in this case show that they are not..... 42

(1) Appellees' facility is a separate and independent establishment. The employees involved are employed by an independent contractor and not by Anaconda. Appellees' facilities are therefore not part of any integrated effort to produce goods for commerce 42

(2) If appellees' facilities were abandoned or curtailed, the meals and lodging provided thereby could be presently obtained elsewhere..... 45

(3) Even assuming that equivalent facilities were not instantly available upon the abandonment or curtailment of appellee's facilities, the already existing restaurants, stores and housing facilities could quickly meet the additional demand..... 51

(4) Actual experience elsewhere with appellees' type of facility under similar circumstances, demonstrates that such facility is not closely related or directly essential to the production of goods for commerce	54
--	----

II.

Assuming the Act were held to cover the activities of appellees' employees, appellees' business is exempt as a retail or service establishment within the meaning of Section 13(a)(2)	58
A. In the event the court should find coverage, it can then consider the application of Sections 13(a)(2) and (1)..	58
B. The evidence, which is uncontradicted, clearly shows that appellees' facility is a retail or service establishment under Section 13(a)(2).....	60

III.

Assuming the Act were held to cover the activities of appellees' employees, appellees' employees are exempt under Section 13(a)(1) of the Act.....	72
Conclusion	73
Appendix :	

The effort to continue the law as it had been interpreted, was specifically rejected by the defeat of an amendment designed to accomplish this result.....App. p.	1
Additional quotations from the legislative history of the amendment to Section 13(a)(2) of the Act.....App. p.	4

TABLE OF AUTHORITIES CITED

CASES	PAGE
Armour & Co. v. Wantock, 323 U. S. 126, 65 S. Ct. 165, 89 L. Ed. 118.....	43, 44
Bayer v. Courtemanche, 76 F. Supp. 193.....	36, 37, 38
Consolidated Timber Co. v. Womack, 132 F. 2d 101.....	
.....	17, 24, 28, 29, 30, 32, 33, 34
.....	36, 38, 42, 43, 44, 46, 51, 57
Flotation Systems v. United States, 136 F. 2d 483.....	60
General Electric Co. v. Porter, 208 F. 2d 805; cert. den., 347 U. S. 951.....	52
Hanson v. Lagerstrom, 133 F. 2d 120.....	24, 29, 38, 39, 44
Hawkins v. E. I. DuPont de Nemours & Co., 192 F. 2d 294.....	40
Kam Koon Wan v. E. E. Black, Ltd., 188 F. 2d 558; cert. den., 342 U. S. 826, 96 L. Ed. 625.....	42
Kirschbaum Co. v. Walling, 316 U. S. 517, 86 L. Ed. 1638....	
.....	19, 40, 41
Kuhn v. Canteen Food Service, 77 F. Supp. 585.....	33, 35, 36, 39
McComb v. Factory Stores Co., 81 F. Supp. 403.....	16, 17, 19
McLeod v. Threlkeld, 319 U. S. 491, 87 L. Ed. 1538.....	
.....	29, 30, 31, 32, 33, 38, 40, 57
Philadelphia, Baltimore & Washington R.R. Co. v. Smith, 250 U. S. 101, 39 S. Ct. 396, 63 L. Ed. 869.....	28, 30
Relander v. Mason County Logging Co., 2 WH Cases 1052.....	37
Sbicca-Del Mac v. Milius Shoe Co., 145 F. 2d 389.....	59
Tipton v. Bearl Sprott Co., 93 F. Supp. 496.....	32, 35, 36, 43, 44, 45
Tobin v. Cherry River Boom & Lumber Co., 102 F. Supp. 763....	39
Tobin v. Promersberger, 104 F. Supp. 314.....	39
MISCELLANEOUS	
95 Congressional Record, p. 11001	24
95 Congressional Record, pp. 12505-12506.....	70
95 Congressional Record, p. 12510	65

95 Congressional Record, p. 14928.....	18, 19
95 Congressional Record, p. 14929.....	19, 20
95 Congressional Record, p. 14936	21
95 Congressional Record, pp. 14938, 14939-14940.....	22
95 Congressional Record, p. 14870.....	25, 26
95 Congressional Record, p. 14871.....	25, 26
95 Congressional Record, p. 14872.....	26, 27
95 Congressional Record, p. 14873	26
95 Congressional Record, pp. 14931-14932.....	68
House Report No. 1453, 81st Cong., 1st Sess.....	17, 66, 67

STATUTES

Code of Federal Regulations Title 29, Chap. V, Regulations, Part 541, Sec. 541.4.....	72
Code of Federal Regulations, Title 29, Chap. V, Part 779, Inter- pretative Bulletin	63
Fair Labor Standards Act, Sec. 3(j).....	
.....	13, 15, 16, 23, 27, 40, 42, 57
Fair Labor Standards Act, Sec. 12(a) (1).....	58
Fair Labor Standards Act, Sec. 13(a).....	64
Fair Labor Standards Act, Sec. 13(a)(1).....	
.....	2, 7, 10, 14, 58, 59, 72, 73
Fair Labor Standards Act, Sec. 13(a)(1), 6, 7.....	73
Fair Labor Standards Act, Sec. 13(a)(2).....	
.....	1, 10, 14, 58, 59, 60, 65, 66, 70, 71, 73
Fair Labor Standards Act, as amended (Chap. 676, 52 Stats. 1060; Chap. 736, 63 Stats. 910; 29 U. S. C. (1952 Ed.), Sec. 201 et seq.).....	1
Federal Rules of Civil Procedure, Rule 52(a).....	42

No. 14327.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR,

Appellant,

vs.

HAROLD S. ANDERSON, JR., *et al.*,

Appellees.

BRIEF FOR APPELLEES.

Statement of Issues.

Appellees operate dining and lodging facilities located near a mine operation in California. Such facilities are utilized by employees of another company which operates the mine. Appellant contends that the employees of Appellees engaged in providing such facilities are subject to the Fair Labor Standards Act, as amended.¹ Accordingly it filed an action for injunction in the District Court.

Appellees contended, in reply, first, that the Act did not cover Appellees' employees; second, that if it were determined that the Act did so, Appellees' establishment was exempt under Section 13(a)(2) of the Act as a retail

¹C. 676, 52 Stat. 1060, as amended by C. 736, 63 Stat. 910, 29 U. S. C. (1952 ed.), 201 *et seq.*, herein referred to as the Act.

and service establishment, and, thirdly, Appellees' employees were exempt as engaged in a local retailing capacity under Section 13(a)(1) of the Act.

The facts were principally established by stipulation, additional facts also being established at the trial.

The District Court dismissed the action and denied Appellant's request for injunctive relief upon the ground that the Act did not cover Appellees' employees. The District Court also found that Appellees' operation was a retail and service establishment.

Appellant thereupon appealed. In view of the circumstances of this case, the issues presented for decision by this Court are the same as those which were presented to the District Court.

Statement of Facts.

Because Appellant's Statement of the Case is incomplete, argumentative in major respects and includes conclusions concerning the significance of the facts stated, Appellees feel it desirable to present their own statement of facts.²

The facts are established principally by stipulation [Tr. 14-50]. Additional facts not included in the stipulation were established at the trial by evidence which is uncontradicted in any material respect. The Findings of Fact appear at pages 52 to 74 of the Transcript of Record.

²All emphasis in this brief is ours except where otherwise indicated. References to the Transcript of Record are designated "Tr." followed by the page number. References to Appellant's brief are designated "App. Br." followed by the page number. References to the exhibits attached to the Stipulation are designated "Stip. Ex.", followed by the letter. Reference to Appellees' exhibits accepted into evidence at the trial are designated "Def. App. Ex." followed by the letter.

Appellees are copartners in a concern doing business as H. S. Anderson Co. Appellees operate an establishment providing dining and lodging facilities principally, but not exclusively, to employees of the Anaconda Copper Mining Company (hereinafter referred to as Anaconda) near Darwin, California. For this purpose Appellees lease certain properties from Anaconda. In connection with the furnishing of dining and lodging facilities to the employees of Anaconda, Appellees operate as an independent contractor in accordance with the terms of a contract, as amended, with Anaconda [Stip. Ex. B]. The management, operation and maintenance functions relative to the provision of the dining and lodging facilities are entirely performed by Appellees. The wages, hours and working conditions of the employees of Appellees are determined by Appellees. Such employees are supervised, controlled and directed by Appellees [Tr. 53].

Approximately 11 persons are regularly employed by Appellees at the Anaconda operation. These employees consist of a manager, a chef, commissary clerk, second cook, dishwasher, waiters, combination men and janitors. In addition to making dining, lodging and commissary service available to employees of Anaconda, such services are occasionally utilized by other persons in the area and by the public [Tr. 53].

Appellees' facilities consist of a dining room, kitchen, a commissary where beer, soft drinks, tobacco, toilet and similar articles are sold, and a lodging facility consisting of a lobby and single and double rooms [Tr. 53-54].

Less than 20% of the employees of Anaconda regularly use the dining facility of Appellee, some 80% obtaining their meals elsewhere. About one-fourth of the em-

ployees of Anaconda utilize the lodging facility. While the number of employees of Anaconda will vary, the average number of employees would be in the neighborhood of 222 to 236 [Tr. 55].

An average of 62 employees utilize Appellees' lodging facility which has a capacity of approximately 75, exclusive of those employed by Appellees. Of these, approximately 49 have regularly used the Appellees' dining facility. Others from time to time for various reasons will use such facilities. Men who do not reside at Appellees' lodging facility are occasionally served in the dining room. Meal times are adjusted principally to accommodate the availability of employees of Anaconda. Appellees' facilities are open to be patronized by the public including guests and visitors, salesmen, members of historical and geological organizations which have interests in the area, and other members of the general public who may be in the area for other purposes. An average of 168 meals per month are served to such customers [Tr. 55-58].

Some of the employees of Anaconda who do not use Appellees' lodging or eating facilities reside in homes or apartments rented to them by Anaconda. Others live either in trailers rented by Anaconda or owned by the employees. Still others, some 29, live in neighboring communities. Approximately seven employees of Anaconda live in the town of Darwin about one mile away. Ten others live in the town of Keeler approximately 22 miles from the Anaconda property. Approximately 10 live in the town of Lone Pine located 37 miles from the Anaconda property. Two others live at intermediate points [Tr. 55-56].

These employees commute daily over paved two-lane highways between such communities and the Anaconda property. The principal mode of passenger transportation is by automobile. There are daily deliveries of mail and freight. A contract motor carrier of ore running between Lone Pine and the Anaconda property provides free transportation to those who desire to make use of it. These runs are made at least six times per day, sometimes as frequently as once or twice an hour. Two additional persons may ride in the cab with the driver. The roads are almost always passable [Tr. 58-59].

The town of Darwin is located approximately one mile from the Anaconda facility over a paved two-lane highway. Anaconda is located between Darwin and State Highway 190 which highway, approximately 6 miles from Darwin, runs from Lone Pine into Panamint Valley. Darwin, with a population of 125, contains a service station, post office, a restaurant known as Darwin's Cafe, which among other fare serves steak dinners³ [Tr. 60], Crosson's Cafe which serves hamburgers, chili and beans, ham sandwiches and similar items, and Taylor's which is a combination grocery store and dispenser of soft drinks. In addition, a general merchandise and grocery store, known as Lurcott's is located between the Anaconda property and Darwin. Lurcott's conducts a general grocery business including the sale of

³On two occasions, Appellant states that this cafe is now under new management which "confines" itself to serving ham sandwiches and chili [App. Br. 4, 21]. This statement even if supported would contradict the stipulated facts [Tr. 21], contrary to the Stipulation [Tr. 30]. However, the testimony alleged to support it does not do so; the testimony is not contrary to the Stipulation and by no means purports to be exclusive either as to fare or time of operation.

meats and produce as well as general merchandise. An airport approved by the Civil Aeronautics Authority is also located at Darwin. One employee regularly residing at Appellees' facility owns a home in Darwin. Darwin is not located on Anaconda property [Tr. 59-61; Stip., Exs. E, G, H, I, J, K, L, M, and N⁴].

Olancha is located approximately 34 miles distant from Darwin over a paved highway on the main Los Angeles-Reno highway, U. S. Highway 395. Olancha contains three restaurants as well as three motels. Housing with cooking facilities is also available. These facilities, accommodating 12 persons, rent for \$15.00 per week. The motels are available for \$3.00 per day. Olancha is the community center for several mine and chemical companies [Tr. 61; Stip., Exs. O, P, and Q].

The town of Keeler is located on State Highway 190 between Darwin and Lone Pine. It is approximately 23 miles from Darwin. Keeler contains a restaurant which serves short orders and meals upon a limited basis, and a grocery store. The population is approximately 150 [Tr. 62; Stip., Exs. R, S, and T].

Panamint Springs is also located on State Highway 190, approximately 23 miles by paved highway from the Anaconda property. Permanent Springs, with a population of 10 to 12, contains a restaurant and a motel to accommodate 30 persons and is open to the general public [Tr. 62; Stip., Exs. U and V].

⁴It has been stipulated that Exhibits A through X inclusive and BB, attached to the Stipulation and Order dated October 3, 1953, and Defendant-Appellees' Exhibits A through H inclusive introduced at the trial, could be considered by the Court in their original form [Stipulations before this Court dated April 29, 1954 and May 14, 1954]. These exhibits consist of photographs and documents.

The town of Lone Pine is located on U. S. Highway 395 approximately 38 miles from Darwin, all but 6 miles over State Highway 190 [Stip., Ex. X]. Lone Pine with a population of approximately 1,415 contains several restaurants, motels, a hotel, boarding houses, and rooming houses available to the general public [Tr. 62-63; Stip., Ex. W].

Employees of Anaconda are not confined to Anaconda property or required by Anaconda to eat or lodge at any particular place. Such employees return to their homes during the lunch hour or will bring their own lunches with them to Anaconda facilities [Tr. 64]. Employees of Anaconda, as of September 15, 1952, earned at least from \$86.13 to \$109.65 per week, in addition to health and welfare, premium pay and other fringe benefits [Stip., Ex. BB, Agreement, pp. 28-29; Art. II of Supplement dated September 15, 1952; Section 4(a) of Amendment dated October, 1953].

Appellees' housing and commissary facilities have operated at a profit. However, the dining facility has operated at a loss. With respect to the employees of Anaconda who utilize Appellees' dining facility, Anaconda under its agreement with Appellees, if necessary, meets any deficit up to the amount of \$750.00 per month; salaries and expenses of Appellees' home office, *i. e.*, overhead, are not considered in determining this amount. There is therefore no guarantee of net profit [Tr. 64-66].

Appellant concedes that the commissary clerk is outside the scope of coverage of the Act. Appellant also concedes that even assuming coverage the manager is exempt under Section 13(a)(1) of the Act [Tr. 66].

In the event that the sales and services provided by Appellees at their Darwin operation should be curtailed

or abandoned entirely there would be only a temporary inconvenience to the operation of the mine. The effect upon production at the mine would not be substantial even during this temporary period. There would be no significant effect upon total shipments from the mine, particularly in view of the stocks of ore that are kept in reserve. During the period of a recent strike threat some 20 to 25 employees terminated their employment. Shipments from the mine were not affected as a result thereof [Tr. 68-69].

Appellees' facilities are maintained for Anaconda employees as a convenience only. In the event such activity were curtailed or abandoned some employees using Appellees' facilities might leave the Darwin area. Assuming, however, that as many as one-half of the employees should leave, such employees could be replaced normally within a relatively short time. Those who did not leave could obtain lodging and meals elsewhere in the vicinity. Lodging could be and has been obtained at the housing facilities located at the mine, by purchasing or renting trailers, or in the neighboring communities. Such facilities would in all probability respond to any increased demand [Tr. 69].

Appellees' facilities are not remote and isolated to such an extent that they are removed from ordinary business competition. It is a situation different from one in which the activity is located in a remote and isolated area where competition is nonexistent [Tr. 69].

Appellees' type of facility has become less and less frequent as a means of providing food and lodging for mining employees. Because of improved roads, better transportation and an increased desire for community living

such employees are tending more and more to prefer to live in communities even at considerable distances from their place of work. It is frequent that persons employed in mining operations will live in communities at a distance of thirty to forty miles from their places of work and will commute daily by automobile, bus or other means of transportation [Tr. 69-70].

On several occasions in mining communities in the western states, facilities similar to those of Appellees' and under circumstances similar in material respect to those of Appellee Darwin operation, have been curtailed or abandoned without affecting either the production of the mine or the availability of employees. In one instance, an Appellees' type facility, under similar circumstances, was completely destroyed by fire. It was not rebuilt [Tr. 70-71].

In many mining operations, no facilities such as Appellees' have existed at all. Persons employed at such mining operations have lived or are living at distances ranging from 30 to 38 miles and commute by automobile or bus daily to and from the mine. In some cases as many as one-half of the employees at the mine will so commute [Tr. 71-72].

In 1945 production at the Darwin mine amounted to 150 tons per day. There were 6 housing units and 20 trailers at the mine; and Appellees' facilities were somewhat more utilized than today. During 1953, production was approximately 450 tons per day. There are 61 housing units and 37 trailers at the mine; and an average of 62 persons reside in Appellees' facilities. During this period employment has correspondingly increased at the mine [Tr. 72].

Children of persons employed at the mine attend school at Darwin up to the eighth grade; children in higher grades attend school in Lone Pine, commuting daily by bus. Up until 2 years ago seventh and eighth grade students also commuted to Lone Pine, but now attend school in Darwin [Tr. 72].

Employees who upon obtaining employment at the mine reside and eat at Appellees' facilities frequently will leave such facilities and obtain lodging and their meals elsewhere without affecting their employment with Anaconda. During the month of August, 1953, at least three employees, after having lived at Appellees' facilities, left to obtain lodging and their meals elsewhere without having severed their employment with Anaconda. So many factors affect the supply of labor that the presence or absence of Appellees' type of facility would not be a deciding or important factor in the existence of a labor supply [Tr. 72-73].

Additional facts concerning the issues raised by Sections 13(a)(1) and (2) of the Act, which are either stipulated or established by uncontradicted evidence are as follows:

All of Appellees' annual gross income in the Darwin operation results from the furnishing of goods and services within the State of California [Tr. 29, 73].

All of the meals served, goods sold, or lodging furnished by Appellees at their Darwin Operation, were to persons who consume such meals or goods or utilized the goods and services in the Anaconda area and in the State of California. All of such sales and services are to ultimate consumers and none are for resale. Over 75%

of the total annual dollar volume results from the dining and commissary operations [Tr. 29, 73, 64-65].

The sales and services provided by Appellees at their Darwin operation are recognized and known as retail sales or services in the restaurant industry. The term "retail sale or service" has a recognized meaning in the restaurant industry. The term in the industry means any establishment principally engaged in the preparing and serving of food directly to the consumer thereof generally for consumption on the premises of the establishment. Appellees' sales and services at the Darwin mine are included within this definition and are recognized and known as retail sales and services by the restaurant industry. The term "restaurant industry" includes the industry nationally and in the Southern California area. Appellees are a part of the restaurant industry [Tr. 148-150, 154; Def.-App. Exs. A and H].

The National Restaurant Association is an association representing approximately 80% of the total dollar volume of the restaurant industry of the United States. Any person who is the owner or manager of a restaurant or an executive officer or acts in a supervisory capacity of a restaurant operating company is eligible to membership in the association. A restaurant is defined by the association as any establishment or unit thereof which has as its object the preparation, serving or selling of meals or meal items to the general public or any segment thereof. Appellees come within this definition and are members of the National Restaurant Association [Tr. 148-150; Def.-App. Ex. A].

The Southern California Restaurant Association represents approximately 80% of the restaurant industry in

Southern California upon the basis of dollar volume of business. Those eligible for membership are public eating establishments owned, operated and managed by persons, firms or corporations preparing and serving food to the public or to their own employees. Appellees come within this definition and are members of the Southern California Restaurant Association [Tr. 160-161; Def.-App. Ex. H].

One of the major subdivisions into which the restaurant industry is divided is that of industrial or in-plant feeding establishments also referred to as industrial caterers. Appellees' Darwin operation is recognized and known in the industry as part of such subdivision. Industrial feeding establishments participate in the activities of the National Restaurant Association in the same manner as the other subdivisions of that association. All such subdivisions are treated as part of the restaurant industry for purposes of publications, conventions and other activities [Tr. 149-152; Def.-App. Exs. B, C, D and E].

The United States Census in its 1948 Census of Business and in its proposed 1953 Census of Business has placed Appellees' type of activity in the category of a retail trade and thereby recognized it as a retail activity and as part of the restaurant industry [Tr. 152-153, Def.-App. Ex. F].

The Office of Price Administration established pursuant to act of Congress during the period of World War II, in its survey and compilation of statistics concerning the restaurant industry, prepared during its existence, included Appellees' type of establishment [Tr. 153-154, Def.-App. Ex. G].

Each of Appellees' employees is customarily and regularly engaged during all of his working time in making retail sales of goods or services of which more than 50% of the dollar volume is made within the State of California, his place of employment, and in performing work directly with respect thereto or immediately incidental thereto. Such employees are engaged in a local retailing capacity. The duties of Appellees' employees are described by stipulation on pages 66 to 68 of the Transcript.

Summary of Argument.

1. The language of Section 3(j) of the Act, the section which controls whether or not the Act is applicable to Appellees' employees, is explicit in denying such coverage in that it requires that the activities of such employees must be *closely related* and *directly essential* to the production of goods for commerce. Such activities are not so related or essential to the production of goods for commerce. The legislative history resulting in the amendment to Section 3(j) in 1949 requires this conclusion. Even under Section 3(j) prior to its amendment, the Act did not cover the activities of Appellees' employees. The decisions, including those of the United States Supreme Court, compel this result. The facts in the case clearly distinguish it from decisions relied upon by Appellant. These decisions themselves must be reexamined in the light of later decisions and the action of Congress in passing the 1949 amendments.

Appellees' operation is not remote or isolated. Were Appellees' facilities curtailed or abandoned, substitute facilities are presently available. In any case, existing facilities could readily expand to absorb the additional

demand. In the interim the existing facilities would suffice. Experience in similar situations has shown that the abandonment or curtailment of facilities provided by Appellees has not affected either production or the supply of labor. Therefore, employment in connection with such facilities is not closely related or directly essential to the production of goods for commerce.

2. Even assuming that the Act were held to cover Appellees' employees, Appellees' operation is nevertheless a retail or service establishment and therefore exempt under Section 13(a)(2) of the Act. This section, as amended in 1949, establishes three criteria for determining a retail or service establishment. Two of these three criteria have been established by stipulation; the third has been established by substantial evidence—testimony and documentary—which stands uncontradicted. The legislative history resulting in the 1949 amendment to Section 13(a)(2) removes all doubt that Appellees' establishment comes within its terms.

3. Even assuming that the Act were held to cover Appellees' employees, such employees are exempt under Section 13(a)(1) of the Act because they are engaged in a local retailing capacity. The Administrator, pursuant to such section, has defined what constitutes being engaged in this capacity. The facts in this case clearly meet the requirements of that definition.

ARGUMENT.

I.

The Fair Labor Standards Act, as Amended, Does Not Cover the Activities of Appellees' Employees. Such Employees Are Not Engaged in Any Closely Related Process or Occupation Directly Essential to the Production of Goods for Commerce.

A. Section 3(j), Particularly in the Light of the Legislative History Preceding Its Amendment in 1949, Excludes Appellees' Employees From Coverage.

The Fair Labor Standards Act of 1938 was passed by Congress to cover employees who were engaged in commerce or in the production of goods for commerce. Section 3(j) of the Act, as amended, defines the term "produced" as follows:

" 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof, in any State.*"

Appellant has not contended that the employees involved here are engaged in commerce, nor has it contended that such employees are employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on goods produced for commerce. Appellant does contend, however, that such employees are employed in a "closely related process or occupation directly essential to the production" of goods for commerce.

Prior to the 1949 amendments to the Act, Section 3(j) established the test in this respect to be whether the employees were engaged "in any process or occupation *necessary* to the production" of goods for commerce.

The Wage and Hour Administrator, in interpreting the Act prior to its amendment, placed a very broad interpretation upon the word "necessary", in many cases construing it to mean little more than "convenient". The courts sometimes followed the views of the Administrator. Several cases were decided under the Act prior to its amendment in which "necessary" was thus broadly interpreted.

Prior to amending the Act in 1949, Congress severely criticized this result, among others, as being contrary to its intent in enacting Section 3(j). As a result, this section was amended to substitute for the word "necessary," much stronger words, namely, "closely related" and "directly essential."

The attitude of Congress is clearly revealed in the legislative history of the 1949 amendments. It is particularly clear with respect to the factual situation involved in this case. A review of this history concerning the amendment to Section 3(j), can leave little doubt that it was the general intent to reverse the broad interpretation placed upon the word "necessary" both by the Administrator and by the courts.

The case of *McComb v. Factory Stores Co.*, (N. D. Ohio 1948), 81 F. Supp. 403, was the subject of much comment in Congress. This case involved a question as to whether or not the Act covered persons employed by an industrial eating facility similar to that involved in this case. The facility was located in a plant. The employees

were not permitted to leave the plant and were therefore required to eat at the facility, unless they saw fit to bring their own lunch. This is a degree of "isolation" and "remoteness" equal to or more severe than that in *Consolidated Timber Co. v. Womack* (9th Cir. 1942), 132 F. 2d 101, the case principally relied upon by Appellant. The only difference was that in one case the physical circumstances prevented the obtaining of meals elsewhere, whereas in the *Factory Stores* case, Company regulations did so.

The court in the *Factory Stores* case adopted the view of the *Womack* decision and held that under such circumstances the feeding of employees was necessary to the production of goods for commerce. While this case was pending on appeal, it was brought under criticism in Congress and was in effect repealed by the 1949 amendments. As a result, the case was remanded to the Federal District Court, where it was dismissed. The criticism and consequent expression of intent by Congress, as shown in the following excerpt from the legislative history, are even more applicable to the situation in the instant case.

In discussing the bill which was later approved by both Houses without amendment and enacted into law by signature of the President on October 26, 1949, the Managers on the part of the House at the Senate-House Conference which resulted in the bill, issued a House Managers' Statement.⁵ In this report, the House Managers, in discussing the question of coverage, stated:

⁵HR Report No. 1453, 81st Congress, 1st session, October 17, 1949.

“Coverage under the act for a large category of employees is determined by the definition of the term ‘produced’. The definition is divided into two parts. The first part, which the conference bill leaves unchanged, covers any employee ‘producing, manufacturing, mining, handling, transporting, or in any other manner working on * * * goods.’ Thus the first part covers employees engaged in actual production activities as opposed, for example, to employees engaged in maintenance, clerical, or custodial work. The second part of the present definition, covering any employee engaged in ‘any process or occupation *necessary* to the production’ of goods, has been interpreted by the Administrator and the courts to cover employees of many local merchants, because some of the customers of such merchants are producing goods for interstate commerce. It has made no difference that the merchants sell their goods locally and that such goods do not become a part or ingredient of the goods produced by any of their customers (*McComb v. Deibert* (E. D., Pa. 1949), 16 Labor Cases Par. 64,982). The courts have also held the act applicable to employees engaged in maintaining and repairing private homes and dwellings where such homes and dwellings are being leased by interstate producers to their employees. *Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory* (*McComb v. Factory Stores*, 81 F. Supp. 403 (N. D. Ohio, 1948)).

*“Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above cited cases * * *”* (95 Cong. Rec. 14928.)

This is an unusually direct and relevant statement of Congressional intent not to cover the activities of Appellees' employees.

Appellant is well aware of this. In quoting from this statement Appellant edits it in a manner which is an apparent effort to dilute its significance (App. Br. 31).

In expressly distinguishing the *Kirschbaum* case from the *Factory Stores* case, the House Managers go on to say:

“ . . . On the other hand, the proposed changes are not intended to remove from the act maintenance, custodial, and clerical employees of manufacturers, mining companies, and other producers of goods for commerce. Employees engaged in such maintenance, custodial, and clerical work will remain subject to the act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce. All such employees perform activities that are closely related and directly essential to the production of goods for commerce.

“The bill as agreed to in conference also does not affect the coverage under the act of employees who repair or maintain buildings in which goods are produced for commerce (*Kirschbaum v. Walling*, 316 U. S. 517) or who make, repair, or maintain machinery or tools and dies used in the production of goods for commerce. . . . ”⁶ (95 Cong. Rec. 14928-9.)

⁶*Kirschbaum v. Walling*, 316 U. S. 517, however, was criticized in related respects [see p. 67, below].

The House Managers in further discussion of the question of coverage, stated:

“The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:

* * * * *

“All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating, or other living facilities for factory workers, are quite clearly not performing any activities that are closely related or directly essential to the production of goods.”
(95 Cong. Rec. 14929, October 18, 1949.)

In debates in the House concerning the conference bill later enacted into law, Mr. McConnell, one of the House Managers, in reporting to the House on the conference bill stated as follows:

“MR. MCCONNELL. * * *

“The conference report resembles much more closely the bill that the House passed than it does the Senate bill. While the statement of the House managers accompanying the report sets forth in detail an explanation of the amendments agreed upon in conference, I wish to call the attention of the House to some of the principal changes which the conference bill makes in the present law.

“First—and this is important—the coverage of the act for a large number of employees is dependent upon the definition of ‘production of goods for commerce.’ A substantial change has been made in this definition which will have the effect of preventing the Administrator and the courts from extending the

coverage to occupations which are not closely related and directly essential to production.

* * * * *

“ . . . I would like to call your attention to this fact: Under the present act's definition of ‘produced’, it is said that employees are engaged in production who are employed in producing, manufacturing, mining, handling, or working on goods in any other manner or in any process or occupation necessary to production. It is only with that one small part of the definition ‘or in any process or occupation necessary to production’, that we are concerned. For instance, Congress, when it passed the act in 1938, thought that the word ‘necessary’, was a clear indication of intent. But, while it seems clear enough on the surface, nevertheless the Administrator and, later, the court decisions, have been expanding it beyond what was the original intent of Congress. In other words, they were bringing under coverage of the act people employed to clean windows, or to mow the lawns at factories by calling them necessary to production.

. . .

“The conferees felt that the word ‘indispensable’ was too rigid, and so we substituted the words ‘directly essential’, meaning that it was our intention that those in the direct flow of production in interstate commerce should be covered, and not side occupations that were not directly essential in producing goods.” (95 Cong. Rec. 14936.)

In the debate concerning the bill, the following was stated concerning the strength of the term “directly essential” and its meaning being not far removed from, if not equal to, the word “indispensable”:

“MR. BARDEN. * * *

As to the discussion of the words ‘directly essential’, that language grew out of putting the word

'indispensable' into the section dealing with production. I think this is a fair statement to make: The only reason in the world why the House conferees incorporated 'directly essential' in place of 'indispensable' was that we thought it was just as strong, if not a little stronger. It was not with the idea of giving to the Administrator more power. We wanted to use some language that would be a warning to him: 'This far you can go and no farther.' That was my reason for going along with the language 'directly essential'.

* * * * *

"MR. LUCAS. * * *

"As to 'indispensable' and 'directly essential', which caused some concern to many of my fellow Members, I stand for 'indispensable.' It think it is a word that will not need much litigation in order to define it, and I felt that when the House adopted such a word that it made clear its desire that the Administrator should not use the 'necessary-to-production' theory in order to go out and cover people under this act who were not originally intended to be covered by the Congress which enacted the first law. But, 'directly essential' connotes 'indispensable'. I do not mean to say that they mean the same thing, or that they do not mean the same thing, but I believe that those words will state unequivocally to the Administrator that, 'You shall not use this act to carry the coverage of the law out into the fields which are foreign to the intent of Congress'. So I believe that 'directly essential' may answer our purpose.

"I am extremely gratified that the conferees in their report used examples and cases in explaining 'directly essential', which I used in my argument during general debate on this bill, for 'indispensable'. So I think that our intent is very closely allied." (95 Cong. Rec. 14938, 14939-14940.)

Mr. Lucas earlier had made the following statement concerning the proposed change in Section 3(j):

“ . . . These changes are needed in order to stem, and in some cases, reverse the action of the Administrator and the courts in bringing under the act many businesses of a purely local type by giving to the word ‘necessary’ an all-inclusive construction.

“ . . . The proposed changes would . . . reverse the Supreme Court’s ruling that the act applies to a local window-cleaning company doing business wholly within the State but some of whose customers are engaged in interstate commerce or in the production of goods for inter-state commerce—*Martino v. Michigan Window Cleaning Co.*, (327 U. S. 173 rehearing denied 327 U. S. 816). . . . Nor could the Administrator hold the act applicable as he has in the past to the following:

* * * * *

“(e) *Employees of an independent cafeteria or canteen located in a factory which produces goods for interstate commerce, the cafeteria serving the employees of the factory—McComb v. Factory Stores Co.* (81 F. Supp. 403).

“The basis, upon which the Administrator and the courts have relied in sweeping all of the foregoing local retail businesses under the act, has been that some of the customers of such businesses are engaged in the production of goods for interstate commerce and therefore the employees of the local retail businesses are engaged in a process or occupation necessary to the production of goods for interstate commerce, notwithstanding that all of their goods or services are sold or rendered within the State to customers located within the State. The rulings of the Administrator and the courts have ignored the history of the law showing the absolutely clear con-

gressional intent that local business was to be excluded. The amendment to Section 3(j) proposed in the substitute bill would make it clear that the law is to be applied within the bounds originally contemplated.” (95 Cong. Rec. 11001.)

Appellant in its brief has cited and quoted repeatedly (App. Br. 14, 15, 28, 29-30, 31, 32, 33, 34) from what it refers to as the “Report of the Majority of the Senate Conferees”, and on occasion misleadingly as the “Senate Report” and “Senate Conference Report” (App. Br. 31, 32). Indeed, this is Appellant’s only significant reference to the legislative history of the 1949 amendments. Appellant cites this statement as containing an express approval of the *Womack* and *Hanson* cases. Congress, however, in debating and considering the amendments stated no such approval.

Appellant neglects to point out that the document referred to is not a “report” at all, but merely a statement of three senators submitted *after* the conference bill had been debated and adopted by the Senate. It was, therefore, not considered by the Senate in its deliberations concerning the Conference Report and as such has no standing as part of the amendments in so far as legislative history is concerned.

Thus, Senator Wherry with respect to the introduction of the document into the record stated:

“ . . . I now have been asked to object to the report if it is offered in any way on behalf of the Senate conferees with any idea that it is the sense of the Senate conferees that the statement is to be used as a basis for interpreting the law, based upon the historical background.

"I am not objecting if the statement is being offered as an individual statement by the Senator from Florida, the Senator from Utah [Mr. Thomas] and the Senator from Montana [Mr. Murray]. If that is the offer that is being made, and the statement is not to be controlling so far as the interpretation is concerned, and if it is not to be regarded as a report of conferees, then I think there is no harm in receiving it." (95 Cong. Rec. 14870.)

The following is also stated:

"MR. MCFARLAND. These statements were not read or presented before the conference report was adopted, were they?

"MR. PEPPER [the author of the statement]. They were submitted after the conference report was adopted.

"MR. MCFARLAND. So they could not be considered as having been adopted by the Senate as an interpretation of the conference report. Therefore I do not see why there should be any objection to three Senators, five Senators, or any other number of Senators, filing their views as to the meaning of this legislation, *because it is definitely clear that the statement is not adopted by the Senate as its interpretation.*" (95 Cong. Rec. 14871.)

* * * * *

"MR. KNOWLAND. I think it should be made clear that there is some difference—and I think the Senator from Florida will agree with me—between a statement of the House managers or the Senate conferees which is printed in advance, and which is available to Members of the House or the Senate before they vote on the acceptance of the conference report, and a statement which is filed, as the Senator from Arizona has pointed out, after the

Senate has acted, which Senators obviously could not have taken into consideration in determining whether or not they should vote for the conference report. In the normal course of procedure the statement of the conferees, if printed, would be available to each Member of the Senate and the House prior to action.

"This is a statement which was brought in, obviously, after the Senate had already acted on the conference report; *and therefore the statement could not in any degree have influenced the Senate in its decision on the conference report.*" (95 Cong. Rec. 14871-2.)

Mr. Pepper, the author of the statement, said:

"Let it be clearly understood that the statement only expresses the views of the named three Senators as to what is the meaning of the language adopted by the conference. . . .

* * * * *

" . . . But this is not intended to bind the Senate. . . ." (95 Cong. Rec. 14870, 14873.)

The fact that the statement did not represent the view of the majority which passed the amendment, is shown by the following statement of Senator Taft concerning it:

"I cannot agree with the 'Summary in Detail of the Provisions of the Bill "To provide for the amendment of the Fair Labor Standards Act of 1938",' as placed in the RECORD by Senator PEPPER. *I do not believe that its treatment of the provision defining the term 'produced', the provisions placing reasonable safeguards upon the authority of the Administrator to sue for the collection of back pay, and certain sections of the provisions defining the retail and service exemption constitute an accurate state-*

ment of the intent of the conferees or the legal effect of the words of the amendments.” (95 Cong. Rec. 14872.)

Indeed, the effort to continue the law as it had been interpreted was rejected when an amendment proposed to specifically accomplish this, was defeated. (See Appx., pp. 1-3):

It is clear, therefore, that since the statement of the three senators involved was not even before the Senate at the time the bill was passed, it can have no standing as part of the legislative history of the 1949 amendments. It was an apparent effort by certain senators to inject into the legislative history of the amendments their opinion as to what the law *should be*. The fact of the matter is that the contentions of these senators, which was that the law in respects relevant here should remain substantially as it had been interpreted, was specifically and definitely rejected. Such intent is clearly expressed in the text of the House Managers' report referred to above, the only report concerning the bill finally enacted into law considered by Congress prior to its enactment.

We feel that the language of Section 3(j) itself should dispose of Appellant's contentions. The use of the terms "closely related" and "directly essential" requires an activity upon which the production process is far more dependent than is true in this case. Any doubt in this respect must be removed by a consideration of the legislative history referred to above. To sustain the Appellant's contention would be to follow the same course followed with respect to the interpretation of "necessary," a course which Congress, in amending Section 3(j), intended to prevent.

B. Even Under the Law Prior to Its Amendment the Act Did Not Cover the Activities of Appellees' Employees.

The principal case relied upon by Appellant is the case of *Consolidated Timber Co. v. Womack* (9th Cir. 1942), 132 F. 2d 101, in which the Court considered the applicability of the Act to employees employed at a cookhouse facility located at a lumber camp in Oregon. One cookhouse was located at a lumber camp where access thereto or therefrom was impossible except by Company train or track speeder. It was admittedly necessary to have a cookhouse at this camp. The other facility was also isolated but operated near a small community in which there was but a single six-stool lunch counter during a part of the time involved. The Court determined that the employees at both facilities were engaged in a "process or occupation necessary to the production of goods in interstate commerce."

The Court in reaching this conclusion did so upon the basis that the cookhouse employees were engaged in an integrated effort to produce goods.

The differences in the factual situation between the *Womack* case and the instant case are at once apparent. These differences will be discussed below.

Equally significant to the factual distinction, however, is the fact that the Court in the *Womack* case relied almost entirely upon the reasoning and conclusions of the United States Supreme Court in the case of *Philadelphia, Baltimore & Washington Railroad Company v. Smith*, 250 U. S. 101, 39 S. Ct. 396, 63 L. Ed. 869, decided in 1919. That case arose under the Federal Employers Liability Act. A large part of the *Womack* opinion on the coverage question consists of quotations from this case.

However, subsequent to the *Womack* decision, and prior to the 1949 amendments to the Act, the United States Supreme Court specifically held that the *Smith* case “should not govern our conclusions under the Fair Labor Standards Act.”

McLeod v. Threlkeld (1943), 319 U. S. 491, 496,
87 L. Ed. 1538, 1543.

In the *McLeod* case the Court held that employees engaged by an employer to prepare and serve meals to maintenance-of-way employees of a railroad, were not engaged in commerce within the meaning of the Act. The employers were a partnership with a contract to furnish meals to the railroad employees. The meals were served in a railroad kitchen and dining car attached to a particular gang of workmen and located on the tracks of an interstate carrier. The car was set conveniently to the place of work of the boarders and in emergencies followed the gang to the scene of its activities. The employees paid the contractor for their meals by orders authorizing the railroad company to deduct the amount of their board from wages due, and to pay it to the contractor. The facts therefore were similar to those in the present case.

The issue to be decided was whether such employees were “engaged in commerce,” within the meaning of the Act. The holding in the *Womack* and the *Hanson* cases were noted but not approved in a footnote to the decision.

The United States Supreme Court held that such employees were not engaged in commerce, and said:

“ . . . In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal

authority. The proposal to have the bill apply to employees 'engaged in commerce in any industry affecting commerce' was rejected in favor of the language, now in the act, 'each of his employees who is engaged in commerce or in the production of goods for commerce.' . . . The selection of the smaller group was deliberate and purposeful."

* * * * *

"In the present instance, it is urged that the conception of 'in commerce' be extended beyond the employees engaged in actual work upon the transportation facilities. It is said that this Court decided an employee, engaged in similar work was 'in commerce,' under the Federal Employers' Liability Act and that it is immaterial whether the employee is hired by the one engaged in the interstate business since it is the activities of the employee and not of the employer which are decisive."

McLeod v. Threlkeld, 319 U. S. 491, 493, 494,
87 L. Ed. 1538, 1541, 1542.

These contentions were rejected under the facts of that case, which are very similar to those in the instant case.

With respect to the *Smith* case, which was almost the entire basis for the *Womack* decision, the Court said:

"The *Smith* Case construed the Employers' Liability Act to apply to a cook and caretaker employed by the railroad to care for a camp car used for feeding and housing a group of the railroad's bridge carpenters. At the time of the accident the cook was engaged in these duties. In holding the cook was 'in commerce' this Court said:

"The circumstance that the risks, of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees

generally and of the bridge workers themselves when off duty, while not without significance, is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce, within the meaning of the Employers' Liability Act.' 250 U. S. 101, 104, 63 L. Ed. 869, 872, 39 S. Ct. 396.

"Such a ruling under the Federal Employers' Liability Act, . . . should not govern our conclusions under the Fair Labor Standards Act."

McLeod v. Threlkeld, 319 U. S. 491, 496, 87 L. Ed. 1538, 1543.

The Court criticized the "over-refinement of factual situations."

"The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope, is not to be repeated in the administration and operation of the Fair Labor Standards Act. . . ."

McLeod v. Threlkeld, 319 U. S. 491, 495, 87 L. Ed. 1538, 1542.

The principal basis for the *Womack* decision as to the coverage of the Act was therefore completely removed by the United States Supreme Court in a later decision specifically involving industrial feeding establishments. In addition, the case has great if not controlling significance in the determination of the question of coverage in this case. Although the question there involved whether the employees were engaged in commerce, the decision has hardly less significance with respect to the question of production of goods for commerce. The Court emphasized the nature and effect of feeding operations by stating:

“It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. *The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.*”

McLeod v. Threlkeld, 319 U. S. 491, 497, 87 L. Ed. 1538, 1543-1544.

Judge Yankwich, in discussing the applicability of the *McLeod* case in *Tipton v. Bearl Sprott Co.* (S. D. Cal., 1950), 93 F. Supp. 496, discussed below, stated:

“In *McLeod v. Threlkeld*, 1943, 319 U. S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538, the question did not turn upon the provision which we are considering now. It turned upon the proposition whether *McLeod* was engaged ‘in commerce.’ Nevertheless, because

his occupation related to nutrition,—to feeding,—the case has a significant bearing upon the problem before us.”

* * * * *

“. . . The language used is very revealing . . .”

93 F. Supp. 496, 501.

The reasoning concerning the *McLeod* case was specifically adopted in *Kuhn v. Canteen Food Service* (N. D. Ill., 1944), 77 F. Supp. 585. That case also involved the question of the coverage of employees of industrial eating establishments. These establishments were located at the plants of a company with whom the employer had a contract for the supplying of food, and served the employees of the producer for commerce exclusively. They were not open to patronage by the general public. In that case, as in the instant case, the facilities were operated not by the Company which produced the goods for commerce, but by an independent contractor.

The Court cited the *Womack* case and certain other decisions under it and then said:

“But it does not follow from this line of cases that the furnishing of food to employees in a plant is necessary to the production of goods in a plant. No analogy whatsoever can be drawn therefrom. As was said in the *McLeod* case above cited: ‘Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.’ And so with the plaintiffs here; they supplied the per-

sonal needs of the employees of the plant in which the goods were manufactured; such employees consumed any food they purchased from the defendant corporation apart from their work; the furnishing of the food is as remote from the production of goods for commerce as it is remote from commerce; the furnishing of the food is as remote from the production of goods for commerce as in cases where the employees supply themselves; and in the case of furnishing food to a maintenance-of-way man engaged in commerce, the food would be as necessary for the continuance of his labor, as the continuance of the labor of a man engaged in the production of goods for use in commerce." (P. 590.)

Concerning the *Womack* case the Court said:

"The Court in that case cited the case of Philadelphia Baltimore & Washington R. Co. v. Smith, 250 U. S. 101, 39 S. Ct. 396, 63 L. Ed. 869, as applicable to solving the question in that case, but the Supreme Court in the McLeod case above cited, said that the ruling in the Smith case under the Federal Employers' Liability Act, 45 U. S. C. A., §51, et seq., 'should not govern our conclusions under the Fair Labor Standards Act.' Also, in the Womack case the court held that the 'cookhouse was not a separate or independent establishment; it was actually a *part* of the Company's facilities—a link in the chain—whereby it operated its business and a means whereby it accomplished the purpose of its existence' and again 'each is a unit in the facilities necessary to the Company's production of goods for commerce.'

"That case is readily distinguishable from the present case inasmuch as the cafeteria or restaurant operated by defendant corporation (a) was a separate and independent establishment; (b) it was not a part

of the facilities of the Company which operated the plant and produced the goods; (c) it is not shown in the complaint that any restaurant was a link in the chain of production of goods; (d) it is not shown by any allegation of the complaint that the service rendered by these independent establishments of defendant corporation were a means whereby the plant manufacturer accomplished the purpose of its existence. The court is convinced that in cases where the production of goods is in an isolated spot where board cannot be readily obtained by employees, that it would be necessary *for the company to furnish board* to its employees, and in such cases the furnishing of the board would be a necessary part of the production of the goods. But where an independent contractor furnishes and makes available a service to employees of a plant and it is not shown that this service is a part of the manufacturer's business, then the service in furnishing food and refreshments is for the convenience but not necessity of the employees of the manufacturer, and service is not bound by such a close tie as makes the service thus made available to the plant employees necessary to the production of the goods." (Emphasis by the Court.)

Kuhn v. Canteen Food Service, 77 F. Supp. 585, 591.

The case of *Tipton v. Bearl Sprott Co.* (S. D. Cal., 1950), 93 F. Supp. 496, decided by Judge Yankwich, also involved an industrial eating establishment located in a plant in Torrance, California. It was also decided under the Act *prior* to its amendment. The employees of the establishment were held not to be covered by the Act. In this decision, as discussed below, great significance was given by the Court to the fact that the employees

on whose behalf this action was filed were employed by the distributor of food, an independent contractor as here, and not by the employer of the employees to whom the food was sold. In addition, the Court said:

“The evidence in this case shows nothing more than that, *for the convenience of its employees*, Columbia entered into an agreement whereby it granted a lease to Sprott in order to have available, *for the convenience of such of their employees as desired to avail themselves of it*, cafeteria service.

“The employees were not *compelled* to patronize the cafeteria, although the cafeteria was not allowed to cater to anyone else except the employees and their visitors. *Columbia did not control the hours, wages or conditions of employment of the cafeteria employees. They were Sprott’s not Columbia’s employees.* The only controls which Columbia exercised were over the hours during which food service was furnished. It also took precautions in order that the employees be not imposed upon by exorbitant prices.” (Emphasis by the Court.)

Tipton v. Bearl Sprott Co., 93 F. Supp. 496, 505.

It was found that the eating facility “met or bested the competition in matters of price, food quality and size of portions.” (93 F. Supp. 496, 497.)

Judge Yankwich also approves the results of the *Kuhn* decision, and that of *Bayer v. Courtemanche* (D. C. Conn., 1947), 76 F. Supp. 193, discussed below, saying of the *Kuhn* decision that the Court there “distinguished it [the *Womack* case] very successfully” (93 F. Supp. 496, 503). He further states that the plaintiff in the *Tipton* case was contending that the statutory term “necessary” be interpreted to mean “convenient.” This contention was rejected.

Relander v. Mason County Logging Co. (Wash. Sup. Ct., 1942), 2 WH Cases 1052, is also directly in point. This case involved a cookhouse at a lumber camp. In determining that the employees of the food facility who were employed by the producer in commerce, and not by an independent contractor, were not covered by the Act, the Court said:

“The facts which brought the case [*Womack v. Consolidated Timber Company*, 43 F. Supp. 625] under the Act were clearly distinguishable from those in the case at bar. There the camp was in an isolated place, seventeen miles from any public means of travel and the employees were transported on speeders owned by the company to the camp and were of necessity obliged to get their meals at the cookhouse. Here the camp is served by public highway and a great majority of the men live at home and travel to and fro to work in private cars taking their meals with them and traveling from many points of the surrounding community as far as thirty miles or more from the camp. This is not the case of an isolated camp. The best evidence of the fact that the cookhouse was not necessary to the production of logs is the fact that for five months the work in the woods was carried on while the cookhouse was closed and I think it is significant that the Mud Bay Logging Company carrying on exactly the same kind of operations in the same vicinity for a period of ten years maintained no cookhouse at all at any time.”

Relander v. Mason County Logging Co., 2 WH Cases 1052, 1054.

The case of *Bayer v. Courtemanche* (D. C. Conn., 1947), 76 F. Supp. 193, is in point. In that case the employee was employed by an independent contractor

furnishing cafeteria services to production workers in a manufacturing plant engaged in the production of goods for commerce. The Court held that such employee was not covered by the Act,

“ . . . in view of the remoteness of plaintiff's work from the actual production of the goods for commerce, and in view of his employment by an independent contractor and the essentially local nature of restaurants and cafeterias generally, . . . ”

Bayer v. Courtemanche, 76 F. Supp. 193, 196.

The cases cited by Appellant do not sustain its position. Aside from the status of the law under the *McLeod* case and the 1949 amendments, the factual situations in these cases are different in material respects.

The case of *Hanson v. Lagerstrom* (8th Cir. 1943), 133 F. 2d 120, on which the Appellant relies, is quite dissimilar from the situation in the instant case. It involves an isolated lumber camp. The cookhouse was operated by the producer in interstate commerce and the employees involved were its employees. The only other eating facility available to the employees, was located some 13 miles distant. It was impossible for the employees to obtain transportation to and from this facility except when the Company, on occasion, furnished transportation. Approximately 75% of the employees working at the operation ate at the cookhouse.

The decision was prior to the pronouncements of the United States Superior Court in the *McLeod* case and of course prior to the 1949 amendments to the Act. It relied upon the *Womack* case.

The *Hanson* decision was distinguished in the *Kuhn* case, where the court said:

“Plaintiffs also cite *Hanson v. Lagerstrom*, 8 Cir., 133 F. 2d 120, 122. In that case the court said: ‘The cookhouse was intended primarily for the benefit of defendant’s logging employees and to increase his production operations. * * * It was owned by the defendant and operated by him in connection with his logging operation.’ The court followed the earlier *Womack* case and this later case is also distinguishable on the ground that the cookhouse was an integral part of the business of the defendant and maintained as part of its business. . . .”

Kuhn v. Canteen Food Service, 77 F. Supp. 585, 593.

In *Tobin v. Promersberger* (D. C. Minn., 1952), 104 F. Supp. 314, the location of the activity was again isolated. All of the employees were required to live in the facility and an overwhelming number of necessity ate their meals there. The roads were frequently impassable because of ice and snow. Very few employees owned cars, and were dependent upon company transportation. The employees involved were employed by the producer in commerce and not by an independent contractor.

The Court said:

“. . . It seems evident that as a practical matter the employees are forced by circumstances to eat and live at the defendants’ camps. . . .”

Tobin v. Promersberger, 104 F. Supp. 314, 317.

Similarly in *Tobin v. Cherry River Boom & Lumber Co.* (S. D. W. Va., 1952), 102 F. Supp. 763, the court was concerned with camp cooks employed in isolated loca-

tions along defendant's railroad. In this decision the court went to great lengths to establish the existence of an employer-employee relationship between the defendant company which was the producer in commerce and the employees employed at the cookhouse facility. The court based its decision upon this relationship.

Appellant also relies on *Hawkins v. E. I. DuPont de Nemours & Co.* (4th Cir., 1951), 192 F. 2d 294 in support of its position. In that decision, the employees who ate at the in-plant facility operated by the defendant, were compelled for security reasons to remain in the plant continuously under guard throughout the working day and were not permitted to leave the premises to obtain food during their lunch period. This constitutes *total* isolation in the interest of the producer for commerce. The employees involved were employed by that producer and not by an independent contractor.

It should also be noted that the Court apparently did not consider the legislative history of the 1949 amendment to Section 3(j). It rather relied almost entirely upon an Interpretative Bulletin of the Administrator which itself apparently gave little or no consideration to that history. Indeed, if anything, the Bulletin appears to be based upon the "Statement of the Majority of Senate Conferees," cited so extensively by Appellant in its brief, and which was rejected (see p. 24 *et seq.*, above).

Appellant also relies upon *Kirschbaum Co. v. Walling* (1942), 316 U. S. 517, 86 L. Ed. 1638. This case was among the early decisions of the Supreme Court concerning the scope of the Fair Labor Standards Act. It, of course, must be constructed in the light of the many cases, including the *McLeod* case, which have followed, and the subsequent action of Congress.

Contrary to the statements of Appellant, even this case was the subject of some criticisms in Congress during the consideration of the 1949 amendments (see p. 67, below). Congress however did not overrule the results of that case but specifically distinguished it from the facts of the present case. (See quotations from the Report of the House Managers, pp. 18-19, above.)

The *Kirschbaum* case and later cases have made it very clear that Congress, even in the Act before its amendment, did not exercise the full scope of the commerce power. The Court said:

“ . . . The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. . . . ”

Kirschbaum v. Walling, 316 U. S. 517, 522, 86 L. Ed. 1638, 1647.

Actually the problem in that case was quite different from that involved here. The Court in the *Kirschbaum* case warned of the hazards of attempting to apply a decision based upon one state of facts, to another and different factual situation. The *Kirschbaum* case is not authority for Appellant's position here.

Therefore the Act would not cover Appellees' employees, even if the law were looked to as it existed prior to the 1949 amendments and without a consideration of the legislative history which led to such amendments.

- C. The Test to Be Applied in This Case Is Whether or Not the Activities of Appellees' Employees Are Closely Related or Directly Essential to the Production of Ore for Commerce. The Facts in This Case Show That They Are Not.

The intent of Congress is clearly stated in the amended Section 3(j) and in the legislative history with respect thereto. Quite aside from the expression of legislative intent, however, the application of the test to determine the question of coverage in this case must sustain the position of Appellees.

The findings of the District Court, of course, must be affirmed unless clearly erroneous.

Federal Rules of Civil Procedure, Sec. 52(a)

Kam Koon Wan v. E. E. Black, Limited (9th Cir. 1951), 188 F. 2d 558, cert. den., 342 U. S. 826, 96 L. Ed. 625.

- (1) *Appellees' Facility Is a Separate and Independent Establishment. The Employees Involved Are Employed by an Independent Contractor and Not by Anaconda. Appellees' Facilities Are Therefore Not Part of Any Integrated Effort to Produce Goods for Commerce.*

In the *Womack* case the facility was operated by the Company and not by an independent contractor as in this case. The decision in the *Womack* case states as one of its grounds for decision:

" . . . [the facility] was not operating with the intent or purpose of showing a profit to the owners from the sale of food or service, but to render a very necessary assistance to the business of the Company, which was the production of logs in interstate com-

merce. The cookhouse was not a separate or independent establishment; it was actually a *part* of the Company's facilities—a link in the chain—whereby it operated its business and a means whereby it accomplished the purpose of its existence. . . .” (Emphasis by the Court.)

Consolidated Timber Co. v. Womack, 132 F. 2d 101, 107.

That the employees were employed by an independent contractor furnishing eating facilities to a plant and interested in making a profit, rather than by the producer of goods for commerce, was a factor which alone was a basis of distinction recognized in *Tipton v. Bearl Sprott Co.* (S. D. Calif. 1950), 93 F. Supp. 496.

In this respect and in referring to the *Armour and Co.* case relied upon by Appellant, Judge Yankwich stated:

“I think this approach is important because, in the case on which Sprott relies,—*Armour & Co. v. Wantock*, 1944, 323 U. S. 126, 65 S. Ct. 165, 89 L. Ed. 118,—Mr. Justice Jackson referred to the fact that, while the question whether employees are covered by the Fair Labor Standards Act must be determined by the work in which the employee engages, it is important in each case to determine *by whom the employee was hired*. His Opinion states: ‘The fact that respondents were hired by an employer which shows no ostensible purpose for being in business except to produce goods for commerce is not without weight, even though we recognized in *Kirschbaum v. Walling*, that it might not always be decisive, 316 U. S. [517], at page 525, 62 S. Ct. at page 1121, 86 L. Ed. 1638. . . .’

* * * * *

“Whether we will it or not, when we interpret social statutes, we have to bear in mind the economic realities to which they were directed, and the position of the employee who seeks coverage.

“In determining that position, one of the elements to consider is *by whom he is employed*. In this case, as appears from what has already been said, the employment was by Sprott who had undertaken, *as an independent contractor*, under a lease, to operate a cafeteria upon premises owned by Columbia, which were on land contiguous to the building in which the operations of the steel company were carried on.

* * * * *

“In ascertaining whether the employees of Sprott were engaged in interstate commerce, we must be satisfied that what they did was necessary to the production of the goods of the lessor,—that is, Columbia. *Columbia, not Sprott, was engaged in manufacturing steel for interstate commerce.*” (Emphasis in each quotation by the Court.) (Pp. 499, 500.)

In distinguishing the *Womack*, *Hanson* and *Armour and Co.* cases in this respect, Judge Yankwich said:

“In applying the test which Mr. Justice Jackson laid down in *Armour & Co. v. Wantock*, 1944, 323 U. S. 133, 65 S. Ct. 168, 89 L. Ed. 118,—in determining the relationship of the parties, we are concerned, to some extent, at least, with the question of *who is the employer*. In these three cases, the employer was the person *who was actually engaged in producing goods for interstate commerce. . . .*” (Emphasis by the Court.)

Tipton v. Bearl Sprott Co., 93 F. Supp. 496, 499, 500, 502.

The fact therefore that Appellees are independent contractors and that the employees involved are employed by Appellees and not by the producer of goods in commerce, is very significant in showing that Appellees' activity is not part of any integrated production process.

Appellant attempts to attach some significance to the contractual arrangement between Appellees and Anaconda. We submit that so long as an independent contractor relationship exists—and it is admitted by stipulation—the details to which Appellant refers, cannot have significant weight—certainly not in Appellant's favor. The fact, for example, that the Union representing Anaconda employees may under this contract discuss food and lodging matters with Anaconda cannot bind Appellees, who must look only to their contract with Anaconda. Concerning the quality of food, price and other concerns of the Union and Anaconda, a similar situation existed in the *Tipton* case where the eating facility "met or bested the competition in matters of price, food quality and size of portions" (93 F. Supp. 497).

(2) *If Appellees' Facilities Were Abandoned or Curtailed, the Meals and Lodging Provided Thereby Could Be Presently Obtained Elsewhere.*

Certainly the best, if not the only, significant test to determine whether an activity is closely related or directly essential, would be the consequences which would follow should that activity be curtailed or abandoned. It is closely related or directly essential only to the extent that the productive process is substantially dependent upon its existence. "Closely related" or "directly essential" can only mean that the activity is a sufficiently important part of the production process, so that its removal would, in a substantial respect, prevent or cripple that process.

The location of Appellees' facilities is by no means remote or isolated. The District Court found as a fact that:

“[Appellees'] facilities are not remote and isolated to such an extent that it is removed from ordinary business competition. It is a situation different from one in which the activity is located in a remote and isolated area where competition is nonexistent.”
[Tr. 69.]

Such a finding is amply supported by the evidence, most of which is by stipulation.

In the face of a finding to the contrary, Appellant nevertheless refers to the location of the facilities in question as “one of the most remote and isolated parts of the country” (App. Br. 11). One wonders what experience could cause such a statement concerning a location only 34 miles over a two-lane paved highway from U. S. Highway 365, the main artery between Los Angeles and Reno, and all but 6 of such miles being on State Highway 190.

The basis of the *Womack* decision was that it was remote and isolated and therefore that feeding of the employees was so essential to their work that the preparation and serving of meals was necessary to the production of timber. In this connection, Judge Carter in his decision in the instant case, states:

“I have given you one extreme. On the other hand, we have a different kind of situation here entirely. We have a mining operation within one mile of a small town, an ordinary town. There are some cafes nearby in that town and other towns, there are good roads from one place to another. So you

get away from this picture of isolation, and you have a problem that I do not think comes within that rule.” [Tr. 164.]

Some 29, or almost 14% of the Anaconda employees live and eat in the surrounding communities, Lone Pine, Keeler, Darwin and elsewhere. This is the best possible evidence that it is feasible to obtain board and lodging elsewhere than at Appellees’ facilities. It is clear from the evidence that Lone Pine alone, with numerous restaurants, hotels and boarding and rooming houses, is accessible and available to provide board and lodging for the employees who now board and lodge at Appellees’ facilities, should such be necessary. Appellant in effect concedes this (App. Br. 12). Some 10 employees by choice live in Lone Pine and commute daily. The fact that school children also commute confirms the fact that this is not only a possible alternative, but also a usual one. Lodging may also be obtained in other communities.

In excess of 80% of the Anaconda employees do not eat at Appellees’ facility. 75% do not live at the facility. This means that only some 49 employees would have to obtain board and lodging in surrounding communities in the event Appellees’ facilities were abandoned. An additional 13 who live at the facility but do not eat there, would have to find lodging. Almost one half the number of employees of Anaconda who would be displaced if Appellees’ facility were abandoned, already live and eat in the surrounding communities. And sometimes the number of employees who reside in Appellees’ facilities is as low as 30.

At least one-half of the employees who utilize Appellees’ facilities own their own cars. Assuming that the other

half do not own their own cars, it would be quite usual to obtain rides with the half that do, or others that regularly commute from the surrounding communities. In addition, transportation to and from Lone Pine, ranging in frequency from six times daily to once or twice an hour, is available. All of the communities are connected by paved two-lane highways, open the year around with only rare exceptions which are quickly removed.

No significant problem with respect to obtaining meals or food would exist. Two restaurants already exist at Darwin, one of which, among other things, already serves steak dinners. In addition, there are two grocery stores where food may be obtained. Meals are also available in the surrounding communities.

Thus the facts show without any significant contradiction that even if Appellees' facilities were shut down that those employees of Anaconda who eat and reside there could find presently existing facilities to substitute for those provided by Appellees.

Three employees presently utilizing Appellees' facilities testified that if such facilities were shut down they would obtain food and lodging elsewhere. Such an occurrence would not affect their employment with Anaconda. One owned a home in Darwin where he would move [Tr. 103-104, 106-107, 110-111].

In any case, the existing facilities, even assuming some of them not to be the best substitute for Appellees' facilities, would nevertheless be quite adequate as a temporary measure pending the obtaining of better facilities. For example, even some of the housing facilities which Appellant claims are the more expensive, are actually within the means of the Anaconda employees—certainly on a

temporary basis. As of September 15, 1952, these employees earned at least from \$86.13 to \$109.65 per week in addition to health and welfare, premium pay and other fringe benefits.

Appellant in its brief quotes the rates for the most expensive motel accommodations as being out of the question for the "ordinary miner." Actually this most expensive rate upon a daily, not weekly or monthly, basis would cost each of two employees \$82.50 per month, perhaps one-fifth of the monthly income of the lowest paid employee. Other accommodations are, of course, much lower in cost.

In addition, many employees who reside and eat at Appellees' facilities upon obtaining employment at the mine, frequently leave such facility. Upon doing so, they obtain lodging and their meals elsewhere without affecting their employment with Anaconda. During the month of August, 1953, for example, this was done by at least three employees without affecting their employment relationship. It is obvious therefore that such employees could just as well temporarily obtain lodging and meals at other places pending their obtaining a permanent location. Appellees' facilities cannot be in any essential in this respect. Indeed, the District Court specifically found that the presence or absence of such facilities would not be a deciding or important factor in the existence of a labor supply.

The District Court also found that Appellees' facilities are maintained for the convenience of Anaconda employees only.

It was found, too, that in the event Appellees' facilities were curtailed or abandoned, the employees who might leave could be replaced normally within a relatively short time. Those who did not leave could obtain lodging and meals elsewhere in the vicinity. Lodging has been and could be obtained at the housing facilities located at the mine by renting or purchasing trailers, or in the neighboring communities. Meals, groceries, commissary and similar items could be obtained at Lurcott's store, at eating and grocery establishments located in Darwin and in the surrounding communities. In any case such facilities, in all probability, would respond to any increased demand.

It was further specifically found by the District Court that there would only be a temporary inconvenience to the operation of the mine in the event that Appellees' facilities should be curtailed or abandoned entirely. Even during this temporary period the effect upon the production at the mine would be insubstantial. In such event there would be no significant effect upon total shipments from the mine, particularly in view of the stocks of ore that are kept in reserve. The correctness of this finding is shown by actual experience which is uncontradicted, namely, that during the period of a recent strike threat some 20 to 25 employees terminated their employment without affecting shipments of ore from the mine as a result thereof.

(3) *Even Assuming That Equivalent Facilities Were Not Instantly Available Upon the Abandonment or Curtailment of Appellees' Facilities, the Already Existing Restaurants, Stores and Housing Facilities Could Quickly Meet the Additional Demand.*

In determining whether or not Appellees' facilities are closely related to or directly essential to the production of goods for commerce, it is necessary to consider what, as a matter of common knowledge and reasonableness, would occur in the event of the abandonment or curtailment of such facilities. Appellant contends that we cannot look to what would happen if Appellees' facilities were curtailed or abandoned, citing the *Womack* case.

But this is not what *Womack* says. As quoted by Appellant, *Womack* says, “. . . it is not what could have been the fact, but what actually was the fact, upon which the decision must rest.” (132 F. 2d 101, 107.) That case thus states that what must be looked to are the facts as they are, not what they might be. We do not take issue with this statement because it does not—indeed it could not—be construed to hold that the situation cannot be looked to as to what would happen if the Appellees' facility were abandoned or curtailed. This is part of “what the facts actually are.” Otherwise it would be impossible to apply the test established by the Act, namely, whether the activity is closely related or directly essential to the production of goods.

How else can the significance of an activity be determined, except to consider the consequences of its absence. It is absurd to say that we can look only at a static situation—only the one which exists at the instant of consideration. A simple example should suffice. If it were necessary to determine whether or not a fire department were directly essential to the safety of a community, the

obvious consideration would be the consequences of not having a fire department. Appellant, however, would have us conclude that merely because there was no fire in progress at the time of the consideration, a fire department is not essential to the safety of a community. The only element of any significance is what may happen as a matter of common knowledge, if no fire department were established.

Thus in the case cited by Appellants concerning firemen,⁷ the Court in considering this very question, and as quoted by Appellant, said: “. . . in the event they [the communities] were destroyed by fire the smooth functioning of the plant would be interrupted” (208 F. 2d 805, 811).

In the instant case the facts show there would be no such interruption. In addition, Appellant itself relies on facts not part of what it says are the “facts as they are,” in attempting to make significance out of the fact that the facilities were once operated by Anaconda.

If within a short time following the abandonment or curtailment of Appellees’ facilities, substitute facilities, not instantly available, should shortly become available, it is clear that the abandoned facilities could not possibly be directly essential to the production of ore for commerce. This is particularly true if facilities, even though not as desirable, are nevertheless available during the interim. The fact therefore that this potential situation existed would be most relevant in determining the question of whether the activities of Appellees’ employees are closely related or directly essential to the production of goods.

⁷*General Electric Co. v. Porter*, 208 F. 2d 805; cert. den., 347 U. S. 951.

The facts show in the instant case that present facilities exist to take care of any additional demands resulting from the abandonment of Appellees' facilities. But even if this were not the case, facilities are presently available which could be readily expanded to accommodate the needs of such employees.

Thus there are presently two existing restaurants in nearby Darwin, one of which serves steak dinners and which, without any question, would be most happy to serve more of such dinners. Both restaurants would undoubtedly expand their fare and hours of operation should the demand warrant it. Such expansion is not even required in the surrounding communities. However, should such expansion be warranted, it would undoubtedly immediately follow.

Judge Carter, in deciding this case, very ably stated this concept as follows:

“Congress passed this law having in mind that this is a competitive society. We have free enterprise. They didn't say so in the statute, but they knew that. We assume they had that in mind. So what happens? If the Anderson commissary should close down, I haven't a doubt but what the people who operate restaurants in the town of Darwin would expand their facilities if there was trade coming into these other restaurants. If men came and wanted meals, I don't know of any merchant that would turn away business that comes to his door, and I haven't a doubt but what if the Anderson operation would close down, outside of some slight initial period of readjustment, that the needs of the workers in the industry could be well taken care of probably right in the town of Darwin, not even having to worry about these towns 14 to 38 miles away.” [Tr. 164.]

- (4) *Actual Experience Elsewhere With Appellees' Type of Facility Under Similar Circumstances, Demonstrates That Such Facility Is Not Closely Related or Directly Essential to the Production of Goods for Commerce.*

Expert evidence, which is uncontradicted, establishes that the type of facility involved here has become less and less frequent as a means for providing food and lodging for mining employees. Because of improved roads, better transportation and an increased desire for community living, such employees will tend more and more to live in communities at considerable distances from their place of work. It is frequent that persons employed in mining operations will live in communities at a distance of 30 to 40 miles from their places of work and commute daily by automobile, bus or other means of transportation. This is most relevant evidence establishing that the activities of Appellees' employees are not closely related or directly essential to production of ore for commerce.

Expert and uncontradicted testimony also establishes that on several occasions in mining communities in the Western states, facilities similar to those involved here and under circumstances similar in material respects to those of Appellees' operation, had been curtailed or abandoned without affecting either the production of the mine or the availability of employees.

Typical of such a situation is the United States Mining Co., near Bingham, Utah, which shut down its lodging and boarding facility entirely in 1946. In another instance, an Appellee-type facility under similar circum-

stances was completely destroyed by fire. It has not been rebuilt. The employees in each case who formerly lived and ate at the Appellee-type facility continued their employment and obtained their lodging and meals elsewhere. In some cases, the facilities in nearby towns expanded to take care of the increased demand. In others, the employees located in communities at some distance from the mine and commuted daily. In still others, the employees obtained housing facilities and provided their own meals. Neither production nor the availability of employees was substantially affected [Tr. 71].

Another situation is the Mountain City Copper Company operation, located about four miles from the town of Mountain City, Utah, where a facility similar to that of Appellees' was established. Family facilities—houses and apartment units—were available for about 150 families. About 100 single men obtained lodging and meals at a facility similar to Appellees' operated by an independent contractor. During a period of some 12 years from 1935 to 1947, the number of persons who utilized this facility steadily decreased until at the end of the period it had been discontinued entirely and had been taken over by a man and his wife who provided lodging and meals for 18 to 20 employees. The remaining 75 or 80 were lodging and eating elsewhere, or rotating between the various facilities in the area. During the same period people in the town of Mountain City—population about 200 in 1935—began taking in boarders. Eventually, there were two rooming houses and a hotel operating in the

town. The mine facility became unattractive as a business proposition. Its discontinuance did not affect the production of the mine. During the period involved the number of employees remained at approximately 300 [Tr. 70-71].

In many mining operations, no facilities such as Appellees' have existed at all. Persons employed at such mining operations have lived or are living at distances ranging from 30 to 38 miles and commute by automobile or bus daily to and from the mine. In some cases as many as one-half of the employees at the mine will so commute. Among several specific instances are the Utah-Delaware Mining Company and other mining operations in Bingham Canyon, Utah, and the National Tunnel and Mines Company, Tooele, Utah [Tr. 71-72].

Judge Carter in his opinion in this case stated:

"I think that this commissary, boarding house, was more essential to the mining operation when it first started than it is now, and the longer the operation progresses there the less essential it will be. It is a convenience, a convenience particularly to the type of man who has no family or who is willing to leave his family and go in and take a job. But I can't find that its operation is essential to the production of goods. . . ." [Tr. 164-165.]

In support of this statement are the following facts:

In 1945 production at the Darwin mine amounted to 150 tons per day. There were 6 housing units and 20 trailers at the mine; and Appellees' facilities were somewhat more utilized than today. During 1953, produc-

tion was approximately 450 tons per day. There are 61 housing units and 37 trailers at the mine; and an average of 62 persons reside in Appellees' facilities. During this period employment has correspondingly increased at the mine [Tr. 72].

It is difficult to see, under the facts of this case, how it can seriously be urged that Appellees' facilities are closely related and directly essential to the production of goods. The overwhelming evidence in the case is directly to the contrary. In most respects the evidence is uncontradicted. Appellee's facilities are a matter of convenience and not of necessity. The District Court so found.

Appellant's major effort is to extend the holding in the *Womack* case to the quite different factual situation of this case.

That case, however, does not warrant the finding urged by Appellant. In addition, the principal basis for the holding in that case was removed by the later decision of the United States Supreme Court in the *McLeod* case. Furthermore, the 1949 amendment to Section 3(j), which section controls this decision, both by its plain wording and by its very explicit legislative history, requires that the judgment of the District Court be affirmed.

II.

Assuming the Act Were Held to Cover the Activities of Appellees' Employees, Appellees' Business Is Exempt as a Retail or Service Establishment Within the Meaning of Section 13(a)(2).

We believe that the facts in this case clearly warrant a holding that the Act was not intended to cover the activities of Appellees' employees and that the District Court's decision in this respect should be affirmed. In the event, however, that this Court should find that the Act does cover such activities, Appellees' operation is nevertheless exempt as a retail and service establishment within the meaning of Section 13(a) (2).

A. In the Event the Court Should Find Coverage, It Can Then Consider the Application of Sections 13(a)(2) and (1).

Although Judge Carter also found that Appellees' operation was a retail and service establishment under that section [Tr. 165], no findings were made on this issue or on the issue involving Section 12(a) (1), discussed below, because such findings were unnecessary in view of the finding on the coverage question.

We submit, however, that such questions may be decided upon the basis of the present record without the necessity of remanding the case to the District Court for retrial on this question, with consequent time and expense to the parties involved. In both the Answer [Tr. 13] and in the Pre-trial Stipulation and Order, the issues concerning the application of Sections 13(a) (2) and 13(a) (1) of the Act, were raised [Tr. 30-31 and 83]. The parties proceeded to trial on the basis of all three issues. Both parties presented their case upon the basis

of the issues raised by Section 13(a) (2) and 13(a) (1), as well as on the question of coverage [Tr. 148-161].

The evidence concerning the exemption questions is established by stipulation or by uncontradicted evidence. A substantial part of the evidence is documentary [Def.-App. Exhibits A through H, inclusive].

Under these circumstances should this Court find that the Act covers the activities of the employees involved here, it can then consider the application of Section 13(a) (2) and 13(a) (1) upon the basis of the present record.

Thus, in *Sbicca-Del Mac v. Milius Shoe Co.* (8th Cir. 1944), 145 F. 2d 389, the Eighth Circuit Court of Appeals stated:

“The trial court made no findings of fact nor conclusions of law, as required by Rule 52(a) of the Rules of Civil Procedure, upon the defenses of ouster and waiver. Since the facts relied upon to support these two defenses are in the record and undisputed we shall not remand the case for this reason alone but will in the exercise of our jurisdiction under such circumstances consider and determine them. See *Mayo v. Lakeland Highlands Canning Co.*, 309 U. S. 310, 316, 60 S. Ct. 577, 84 L. Ed. 774; *Helfer v. Corona Products*, 8 Cir., 127 F. 2d 612; *Knapp v. Imperial Oil & Gas Products Co.*, 4 Cir., 130 F. 2d 1, 3; *Hurwitz v. Hurwitz*, 78 U. S. App. D. C. 66, 136 F. 2d 796; *Brown v. Quinland, Inc.*, 7 Cir., 138 F. 2d 228, 229; *Bowles v. Russell Packing Co.*, 7 Cir., 140 F. 2d 354.”

Sbicca-Del Mac v. Milius Shoe Co., 145 Fed. 2d 389, 400.

In *Flotation Systems v. United States* (9th Cir. 1943), 136 F. 2d 483, this Court stated:

“In its answer Flotation pleaded by way of offset the sum of \$705.72 paid by it in discharge of certain bills which it was said Pollia should have, but did not, pay. Flotation offered evidence in support of this offset, and so far as we can see there is no countervailing proof. The court made no finding on the subject and no award. On the appeal counsel for Flotation has insisted that it was entitled to credit for this amount, whereas counsel for Pollia has failed to discuss the subject at all. We conclude that an offset against the judgment in the sum of \$705.72 should have been allowed. . . .”

Flotation Systems v. United States, 136 F. 2d 483, 484.

- B. The Evidence, Which Is Uncontradicted, Clearly Shows That Appellees' Facility Is a Retail or Service Establishment Under Section 13(a)(2).**

Section 13(a)(2) of the Act provides:

“SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . .”

This definition sets up three criteria to determine what constitutes a retail or service establishment:

(1) More than 50% of the establishment's annual dollar volume of sales of goods or services must be made in California.

(2) 75% or more of the establishment's annual dollar volume of sales of goods or services, or both, must not be for resale.

(3) 75% or more of the establishment's sales or services must be recognized as retail sales or services in the particular industry.

The first two of these criteria have been established by the Stipulation of Facts and incorporated in the Findings of Fact [Tr. 73] which provide:

“(18) All of defendants' annual dollar gross income at their Darwin operation results from the furnishing of goods and services within the State of California.

“(19) All of the meals served, goods sold or lodging furnished by defendants at their Darwin operation are to persons who consume such meals or goods or utilize such services in the Anaconda area and within the State of California.”

With respect to the third requirement, namely that 75% or more of the annual dollar volume of sales of goods or services must be recognized as retail sales or services in the particular industry, Appellees have introduced the following evidence, which is uncontradicted:

(a) The testimony of the Secretary and General Counsel of the National Restaurant Association who testified that his Association represented approximately 80% of the total dollar volume of the restaurant industry in the

United States; that he was familiar with Appellees' type of operation; that Appellees were members of his Association; that the term "retail sale or service" has a recognized meaning in the restaurant industry; that such term is defined as the sale or service of a meal to the consumer, and generally consumed on the premises of the establishment; that Appellees' sales and services are included within this definition and are recognized and known as retail sales and services in and by the restaurant industry; that the type of establishment operated by Appellees was part of the restaurant industry and participates in the activities of the Association in the same manner as its other types of operations; that Appellees' and similar operations are treated as part of the restaurant industry for the purposes of publications, conventions and other activities. Various documents were introduced as further proof of the foregoing [Tr. 148-154; Def.-App. Exhibits A to E inclusive].

(b) It was stipulated that the Secretary of the Southern California Restaurant Association would testify substantially the same with respect to the Southern California area⁸ [Tr. 150, 160-161; Def.-App. Exhibit H].

(c) Testimony and documents establish that the United States Bureau of Census in its 1948 Census of Business and in its proposed 1953 Census of Business placed Appellees' type of activity in the category of a retail trade [Tr. 152-153; Def.-App. Exhibit F].

(d) Testimony and documents were introduced to show that the United States Office of Price Administration,

⁸Appellant's statement (App. Br. 8) that only one witness testified on this subject is therefore incorrect.

during the period of its existence, included Appellees' type of establishment in its survey and compilation of statistics concerning the restaurant industry [Tr. 153-154, Def.-App. Exhibit G].

This evidence shows that the trade associations of which Appellees are a part, both national and state, the United States Census Bureau and the United States Office of Price Administration during its existence, all recognize that Appellees' sales and service are retail sales or services in the industry of which Appellees are a part.

Appellant did not introduce a single item of evidence to rebut this proof. Appellant did introduce its Exhibit 4, Interpretative Bulletin; Part 779, Title 29, Chap. V, Code of Federal Regulations, presumably for the purpose of showing that the Administrator of the Act had found that Appellees' type of operation was not so recognized. It completely fails to do so. In the first place, no evidence whatever was introduced by Appellant to show that the Administrator had even made an investigation or determination which would cover Appellees' type of operation. There is nothing to show that the Administrator himself does not consider Appellees' activities to be recognized as a retail sale or service in the industry. Furthermore, it should be noted that the question is not whether the Administrator recognizes the activity as a retail sale or service. The criterion is whether or not the activity is so recognized *in the industry*. The Administrator himself has made no finding that it is not.

The Act and the Congressional history on the subject have not confined the evidence on this question. On the contrary, the Congressional history is conclusive that the question is not to be decided by the Administrator alone,

by trade organizations alone, or by any other persons or organizations alone, but rather that all evidence which would bear upon this issue should be considered by the Court.

Senator Holland, who was the sponsor of the amendment to Section 13(a), which was adopted by Congress, said in debate on the amendment:

“Mr. Douglas: I understand that the interpretation which would be made would be that given to ‘retail sale’ by a trade association.

Mr. Holland: That is one criterion, of course; but I do not believe the Senator from Illinois, and certainly not the Senator from Florida, would wish to delegate full authority in the matter to a trade association or any other interested group.

Mr. Douglas: Its interpretation would be very persuasive, would it not, even if not controlling?

Mr. Holland: Yes, it would be quite persuasive.”
(95 Cong. Rec. p. 12501.)

“Mr. Holland: . . . The question is what constitutes a retail sale and what constitutes service, and in each case that is not defined in the Act, but instead is defined variably in various industries, by determining what are the habits and practices in the industry.

Mr. Aiken: Let me put the question in another way. Why are these words necessary to the amendment, and in what way do they strengthen and clarify it?

Mr. Holland: They make it very clear, crystal clear, that no one standard can apply to every type of business, but that the standard we are trying to write is to give weight to a certain type of sale, which is a bona fide retail sale, and for the determination of that the Administrator and the courts, as well

as the people who are in business, are warned that the rules prevailing in the business, the understanding of the term in the business, would apply with complete knowledge that the same understanding may not apply in different businesses, because the same standard or rule cannot at all be safely applied to all businesses.”

(95 Cong. Rec. p. 12510.)

All the evidence in this case supports the finding that Appellees' operation is recognized as a retail sale or service in the industry. This evidence is substantial and stands uncontradicted and unrebutted. At least two-thirds of the necessary proof on this question was stipulated, and the remaining one-third was established by substantial, uncontradicted evidence.

Prior to its amendment in 1949, Section 13(a)(2) of the Act provided:

“The provisions of Section 6 and 7 shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.”

The Administrator was strongly criticized in Congress, prior to the adoption of the 1949 amendments, for his erroneous conclusions as to what constituted a retail or service establishment under this section. The Administrator had gone so contrary to recognized concepts of a retail transaction that Congress in the 1949 amendments established specified criteria to be applied in determining this question.

There can be no doubt that the type of operation involved here is within the retail or service exemption, even

assuming coverage. The legislative history resulting in the amended Section 13(a)(2) is clear.

The text of the House Managers' Statement⁹ reporting on the House-Senate conference bill which contained the 1949 amendments as adopted, includes the following:

“EXEMPTIONS

“*General statement.*—The House bill substantially revised Section 13(a)(2) of the Act relating to retail and service establishments. . . .”

* * * * *

“*Retail and service establishments.*—Both the House bill and the Senate amendment contained an identical amendment providing for an exemption for retail and service establishments (Sec. 13(a)(2)). The amendment was continued in the conference agreement.

“The amendment (Sec. 13(a)(2)) agreed to in conference clarifies the existing exemption by defining the term ‘retail or service establishment’ and stating the conditions under which the exemption shall apply. This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts, that no sale of goods or services for business use is retail. See *Roland Electrical Co. v. Walling* (326 U. S. 657; *McComb v. Diebert* (E. D. Pa. 1949), 16 Labor Cases, Par. 64,982; *McComb v. Factory Stores* (81 F. Supp. 403 (N. D. Ohio 1948)).

“Under paragraph (2) of Section 13(a) as agreed to in conference, an establishment is an exempt retail or service establishment if it meets three tests:

⁹House of Representatives Report No. 1453, 81st Congress, 1st Session, October 17, 1949.

“First, over 50 per cent of the establishment’s sales by annual dollar volume of goods or services must be made within the state in which the establishment is located. The requirement that the greater part of the selling or servicing be in intrastate commerce, found in the present law, is eliminated because of the tendency of the courts to hold that many sales or services made or performed within a state are not intrastate sales or services. See *Kirschbaum v. Walling* (316 U. S. 517, 526); *Boutell v. Walling* (327 U. S. 463, 467). Under the new test, if the sales are made within the state in which the establishment is located, it is immaterial that the sales (a) are made pursuant to prior orders from customers, (b) contemplate the purchase of goods by the establishment from outside the state to fill customers’ orders, or (c) *are made to customers who are engaged in interstate commerce or in the production of goods for interstate commerce*. In this connection, see *Walling v. Jacksonville Paper Co.* (317 U. S. 564).

“The second test provides that in order for an establishment to be exempt, not less than 75 per cent of its annual dollar volume of sales of goods or services (or both) must not be for resale. In other words, at least three-fourths of the goods or services (or both) sold must be to purchasers who do not buy for the purpose of reselling. Normally, goods are to be considered as sold for resale even though the purchaser sells them in an altered form. . . .”

“The third test provides that 75 per cent of the establishment’s annual dollar volume of sales of goods or services (or of both) must be recognized in the particular industry as retail sales or services. *Under this test any sale or service, regardless of the type of customer, will have to be treated by the Admin-*

istrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service. Thus, the sale by a farm implement dealer of farm machinery to a farmer will be retail if the sale is recognized as retail in such industry. So, too, sales by the grocery store, the hardware store, the coal dealer, the automobile dealer selling passenger cars or trucks, the clothing store, the dry goods store, the department store, the paint store, the furniture store, the drug store, the shoe store, the stationer, the lumber dealer, etc., whether made to private householders or to business users, will be retail so long as they are recognized as retail sales or services in such industries. Likewise, *sales or services of hotels, restaurants, barber and beauty shops, repair garages, filling stations and the like, whether made or rendered to private householders or to business customers,* will be retail so long as they are recognized as retail sales or services in such industries.

"The location of the establishment, whether in an industrial plant, an office building, railroad depot, or a Government park, etc., will make no difference in the application of the exemption. So long as the establishment meets the tests described above, it will be excluded from the minimum wage and overtime provisions of the Act."

House Managers' Statement (House of Representatives Report No. 1453, 81st Congress, 1st Session, October 17, 1949; 95 Cong. Rec. 14931-14932, October 18, 1949).

Senator Holland, who sponsored the adopted amendment, had the following to say concerning it:

"Mr. Holland: The amendment which we have introduced has been a product of several months'

work and discussion. It was placed in its present form some two months ago and has had wide circulation. I have had numerous inquiries as to its effect upon various situations and its effect upon various court decisions. I have been asked the following questions:

* * * * *

“Question. What type of service establishments would the proposed amendment exempt?

“Answer. Generally, restaurants, hotels, repair garages, watch-repair establishments, beauty parlors, barber shops, hospitals, farm equipment repair shops, laundries, dry-cleaning establishments, valet shops, battery shops, refrigerator repair shops, typewriter repair shops, taxicab companies, exterminator service companies, and other establishments performing local services.

“Question. Is there any doubt about the application of the existing retail and service establishment exemption in the law to hotels?

“Answer. Yes. Applying the philosophy of the *Roland* decision, there is doubt whether a hotel engaged primarily in serving commercial travelers or business customers, is exempt.

“I may say in amplifying that statement in my prepared remarks, Mr. President, that I have already mentioned, during the Colloquy, the fact that *there are at least two other reasons why the hotel and restaurant people are most apprehensive. The first of those is the ruling of the Federal court to the effect that a restaurant which is located within or near a factory, and which primarily is serving the employees of the factory, but which is also serving the general public who come there, and at the same price, cannot be exempted, even though its business is entirely*

separate and it is run by persons who have no connection at all with the manufacturing business."

* * * * *

"Mr. President, the pendency of these two matters which I have mentioned, plus the uncertain effect of the Roland decision, have presented such a situation to the hotel people and the restaurant people that they do have apprehension and they have every justification for being anxious as to what their status is, and for asking that their status be clarified as this Act is being amended.

"Question. Have the courts ever held that a hotel or restaurant was not entitled to the exemption?

"Answer. *Yes. It has been held that a restaurant located in a factory, operating as an independent establishment and wholly unconnected in ownership and management with the factory, was not entitled to the exemption, notwithstanding that the restaurant sold and served its food directly to the employees of the factory and others of the general public. McComb v. Factory Stores* (81 F. Supp. 403 (N. D. Ohio, 1948)). The exemption was denied on the basis of the decision in the *Roland* case."

95 Cong. Rec. pp. 12505-12506.

Additional quotations from the legislative history concerning the amendment to Section 13(a)(2), including a statement by Senator Taft, are set forth in the Appendix, pp. 4-8.

It was the stated purpose of Congress that the term "retail" be applied in its customary and usual sense. It was for this reason that the industry test was applied. The Administrator had so distorted this term in its regulations and bulletins that Congress felt it was necessary to re-establish specifically its original meaning.

In the instant case, Appellees' facilities were available to the public and were utilized by other than employees of Anaconda, to a limited extent. The legislative history makes it clear, however, that there is nothing in the criteria established by Section 13(a)(2) which requires that the service should be principally to the general public.

The facts are stipulated that each employee and each guest, visitor or member of the public pays the stated price for meals. The sales are made directly to the employees, who then pay for such meals. The fact that Anaconda may pay a sum to Appellees in the event the gross profit falls below a certain figure, is not a material consideration. Furthermore, there is no guarantee of net profit. The criteria established by the Act are whether or not 75 per cent of the annual dollar volume of sales of goods or services is for resale and is recognized as retail sales or services in the particular industry. It is the nature of the sale that is the significant factor. The annual dollar volume has reference to the return from these sales from whatever source.

If the three specified criteria are met, the operation constitutes a retail or service establishment under Section 13(a)(2). The extraneous factors referred to by Appellant cannot affect this result.

It is clear from the requirements of Section 13(a)(2), explicitly confirmed by the legislative history resulting in the amendment of that section, that Appellees' establishment is a retail and service establishment. Of the three criteria, two have been established by stipulation; the third has been established by substantial and wholly uncontradicted evidence. Therefore, should the Court determine that the Act covers Appellees' employees, Appellees are nevertheless exempt under Section 13(a)(2).

III.

Assuming the Act Were Held to Cover the Activities of Appellees' Employees, Appellees' Employees Are Exempt Under Section 13(a)(1) of the Act.

Section 13(a)(1) provides:

“The provisions of Section 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulation of the Administrator); . . .”

The Administrator of the Act in this section was given specific authority to establish the criteria for this exemption. He has done so as follows:

“The term ‘employee employed in a bona fide * * * local retailing capacity,’ in Section 13(a)(1) of the Act, shall mean any employee:

“(a) who customarily and regularly is engaged in:

(1) making retail sales of goods or services of which more than 50 per cent of the dollar volume are made within the state where his place of employment is located, or

(2) performing work immediately incidental thereto, such as the wrapping or delivery of packages; and

(b) whose hours of work of a nature other than that described in paragraphs (a)(1) or (a)(2) of this section do not exceed 20 per cent of the hours worked in the workweek by non-exempt employees of the employer.”

Regulations, Part 541, Section 541.4, Title 29, Chap. V, Code of Federal Regulations.

In view of the facts, most of which have been stipulated, and the uncontroverted evidence, it is quite clear that each of the employees of Appellees are exempted according to the tests established by this section. The duties of such employees are described in the Stipulation of Facts [Tr. 27-29], which were incorporated in the Findings of Fact [Tr. 66-68].

It has also been stipulated and found that more than 50 per cent of the dollar volume of sales of goods or services are made within the State of California, the place of employment [Tr. 29, 73]. There can be no question that each employee performs work immediately incidental to, indeed directly involved in, the sale of such goods or services. Not only 80 per cent, but 100 per cent, of the hours of work are involved in such activities.

Therefore, even according to the definition of the Administrator himself, each of such employees is exempt from the requirements of Sections 6 and 7 under Section 13(a)(1).

Conclusion.

For the foregoing reasons, we submit that:

(1) The Act does not cover the activities of the employees of Appellees in this case.

(2) Even if such activities were held to be covered by the Act, Appellees' operation is exempt as a retail and service establishment under Section 13(a)(2) of the Act.

(3) Even if the activities of Appellees' employees were held to be covered by the Act, each of the employees of Appellees is exempt as engaged in a local retailing capacity under Section 13(a)(1) of the Act and the regulations of the Administrator thereunder.

Therefore, the action of the District Court in dismissing the complaint and denying injunctive and other relief should be affirmed.

Dated November 19, 1954.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,
WILLIAM FRENCH SMITH,
JAMES J. RYAN,

By WILLIAM FRENCH SMITH,
Attorneys for Appellees.

APPENDIX.

The Effort to Continue the Law as It Had Been Interpreted, Was Specifically Rejected by the Defeat of an Amendment Designed to Accomplish This Result.

“The clerk read as follows:

Amendment offered by MR. JAVITS: On page 4, line 21, strike out the words ‘in any closely related process or occupation indispensable to the production thereof, in any State.’ and insert ‘or in any process or occupation necessary to the production thereof, in any State.’

“MR. JAVITS. Mr. Chairman, the purpose of this amendment is very simple. It is to test whether or not the Lucas substitute is really a restrictive bill or whether it is a clarifying bill.

“Mr. Chairman, it is estimated that this little word ‘indispensable’—a remarkably restrictive word in any statute—that this little word ‘indispensable’ may throw as many as 750,000 employees in the United States who, by all previously accepted standards, are engaged in interstate commerce out from under the protection of the minimum-wage law Mr. Chairman, that danger applies particularly to clerical and office employees, maintenance and service employees, repair-service employees, business-service employees, and many others. They will be left by the Lucas substitute completely at the mercy of a word which is apparently picked because it is of the utmost restriction and not because it is clarifying.

* * * * *

“MR. McCONNELL. The whole idea we have opposed here is the theory of bringing in certain types of people who were never intended to be brought in when this act was written. This is an effort to clarify that. Do you consider window cleaners to be in interstate commerce?

“MR. JAVITS. When employees are working for a company that is engaged in interstate commerce and their work is necessary to that commerce, they should be covered by the act. *Please note that I am seeking only to continue existing law by my amendment.*

“MR. McCONNELL. I think that is stretching it.

* * * * *

“MR. JACOBS. I wish to say to the gentleman that I support his amendment and I want to endorse what he says when he says it is a test of whether or not those who are talking about leaving people out of coverage really want to support complete coverage that was in the old act.

* * * * *

“MR. JAVITS. *All I am trying to do by my amendment is to restore the language of the act which has been thoroughly interpreted.* What you are seeking to do here by the substitute is something that no one has argued for before, because, unless Members vote for my amendment to restore basic coverage of the Lucas substitute back to the coverage of the act as it stands now, it is definitely an effort to take thousands and thousands of employees

out from under this act who should not be out from under it. This is the acid test. This will tell us whether or not the proponents of the Lucas substitute are serious when they say it is clear and precise and clarifying, or whether their intention really is to restrict the operation of the present law and to take thousands of people out from under the protection of the Fair Labor Standards Act, as indeed this word 'indispensable' in the Lucas substitute will do.

"The CHAIRMAN. The question is on the amendment offered by the gentleman from New York [Mr. JAVITS].

"The question was taken; and on a division (demanded by MR. JAVITS) there were—ayes 88, noes 109.

"MR. JAVITS. Mr. Chairman, I demand tellers.

Tellers were ordered; and the Chairman appointed MR. LUCAS and MR. JAVITS to act as tellers.

"The Committee again divided; and the tellers reported there were—ayes 91, noes 133.

"So the amendment was rejected."

(95 Cong. Rec. 11216-11217.)

Additional Quotations From the Legislative History of the Amendment to Section 13(a)(2) of the Act.

Senator Taft, in debate upon the adopted amendment, said:

“Mr. Taft: . . . It is true that the Wage-Hour Administration, with the assistance of the courts, has steadily encroached on the exemption which was contained in the original act relating to retail establishments.

* * * * *

“What is a retail establishment? I think everyone knew what a retail establishment was, and there were included in the list those who sold automobiles one by one, those who sold farm machinery to farmers. Retail stores of all kinds, hardware stores, the ordinary laundry, all but the most exceptional laundry, in the minds of all of us are retail establishments. Those are the establishments Congress intended to exempt. But what has happened under the law is that the Administrator has found new ways of encroaching on the exemption.

* * * * *

“Under this concept, the Administrator, with some support from the courts, made rulings in the case of those selling automobiles, under which, if I buy an automobile for my own use, for ordinary pleasure purposes, that is a retail sale, but if an automobile salesman sells a truck to a commercial establishment, that is not a retail sale. He does not dare say it is a wholesale sale, because we all know it is not a wholesale sale. He says it is a nonretail sale. Under that concept he has gradually excluded a large number of dealers on the theory that the test is the purpose of the use to which the article is to be put, and if it is to be used in a business instead of in a home, it is a nonretail sale.

“In the case of those who sell farm machinery, the Administrator is implying, with the assistance of the courts, that a farm machinery dealer who sells a tractor or a plow to a farmer is not a retail establishment, because the farmer is not going to use the article just for his own pleasure, he is going to use it to plow the land and make crops which are then to be passed on by him, sold to somebody else.

“It is said that a man may sell only in small lots, in an ordinary retail sale, as a retail store, yet if he sells to a factory, and the factory is not going to consume the articles, but use them as tools in the factory, that is not a retail sale. In that way the Administrator has gradually encroached in this whole field, until all stores are doubtful today whether or not they are going to be retail establishments for many months to come.

“Let us take a stationery store which sells legal forms, and all kinds of stationery. The Administrator says if those forms are sold to a lawyer who is using them in his business, that is not a retail sale, because the purpose of the buyer is not to consume them; it is to use them in his business.

“Take a furniture store which sells furniture. It would not be a retail furniture store if it should sell a certain amount of furniture for office use to people who use the furniture in offices. That concept, to my mind, is utterly erroneous, and it has resulted in a steady encroachment against the retail establishment, until many retail establishments do not have the faintest idea whether or not they are to remain retail establishments and be exempt under the Act.”
95 Cong. Rec. pp. 12515-12516.

“Mr. Holland: So, too, sales by the hardware store, the coal dealer, the automobile dealer, the dry goods store, the paint store, the furniture store,

the stationer, and so forth, whether made to private householders or to business users, will be retail, so long as they are not for resale and are regarded as retail sales or services in such trades. Likewise, the services of hotels, restaurants, repair garages, filling stations, and the like, whether rendered to private householders or to business customers, will be retail so long as they are regarded as retail services in such trades. No longer will it be possible for the Administrator to rule, as he has under the present law, that if a drug store sells drugs to a physician or hospital, the sale is not retail, but if it sells drugs to a private household consumer, the sale is retail; or that if an automobile dealer sells a truck to the local butcher, baker, or grocer, the sale is not retail, but if he sells a passenger car to a private consumer, the sale is retail. . . .”

* * * * *

“Anyone opposing the proposed amendment must necessarily take the position that Congress, in granting the retail and service establishment exemption, intended to reject what is traditionally recognized as a retail sale or service in industry, and to adopt an arbitrary concept of what is retailing or servicing which has no meaning in industry.

“I call particular attention to that. The Congress used the terms ‘retail’ and ‘service establishment’ in their customary meaning, in their customary application, as they were customarily understood in the various industries of the nation. How anyone now could oppose the giving of that concept to complete reality through this amendment, I fail to see, because it would simply carry out clearly what was the intention and objective of those who offered the original Act, and those who voted for it and brought it to passage.

“The industry recognition test which we have proposed is a simple one. . . .”

95 Cong. Rec. 12502.

“Mr. Holland: Mr. President, the doubt arose because the Administrator and the courts, including the United States Supreme Court, ruled that the sale of goods and services for business use, as distinguished from family or household use, was not retail. I cited several cases which I shall read into the record at this time, though I do not propose to weary the Senate by quoting from the cases:

“Roland Electrical Co. v. Walling (326 U. S. 647); Boutell v. Walling (327 U. S. 463); Martino v. Michigan Window Cleaning Co. (327 U. S. 173); McComb v. Deibert (E. Dist. Pa. 1949), 16 Labor Cases, par 64,982.

“The Administrator’s position is succinctly summarized in his 1948 annual report to Congress, page 119, in which he says:

‘The basic test in determining whether a sale is a retail sale, is the purpose of the buyer. A transaction in which goods are bought for personal use by a private consumer, is a retail sale; the sale of goods for resale or other business use or, in general, for use by any purchaser other than the private consumer, is a nonretail transaction.’

“This ruling of the courts and the Administrator was completely novel and theretofore unheard of in any of the retail trades. The ruling meant that the following sales would not be retail:

‘By a farm implement dealer to farmers for business purposes rather than for personal use; by an automobile dealer of trucks for business use; by a hardware store to business customers; by a

coal dealer to apartment houses; and by a dry goods store, a paint store, a furniture store, a stationer, a lumber dealer, and many of the other countless retailers in the nation to business customers. (Supplemental Views of Senators TAFT and DONNELL in S. Rept. No. 640, 81st Cong., 1st Session, the Senate Labor Committee Report on S. 653, p. 9).'

"These rulings, and the few decisions which have been based upon them, together with the more strained rulings which have resulted from those decisions, have brought about the present situation, which I think compels the Congress to pass clarifying legislation."

Cong. Rec. p. 12496.

No. 14327

**In the United States Court of Appeals
for the Ninth Circuit**

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, APPELLANT

v.

HAROLD S. ANDERSON, JR., ET AL., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR APPELLANT

STUART ROTHMAN,
Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

WILLIAM W. WATSON,
Attorney,
United States Department of Labor,
Washington 25, D. C.

KENNETH C. ROBERTSON,
Regional Attorney.

FILED

DEC 15 1954

PAUL P. O'BRIEN,
CLERK

INDEX

	Page
I. Appellees' contention that the <i>Womack</i> and <i>Hanson</i> decisions are no longer controlling and authoritative is expressly refuted by the legislative reports on the 1949 amendments to the Act and by recent decisions of the courts.....	1
II. The sections 13 (a) (1) and 13 (a) (2) issues are not presented for decision on this appeal since the court below made none of the findings requisite to their applicability.....	5
III. Even if the exemption issues are presented for decision on this appeal it is clear that sections 13 (a) (1) and 13 (a) (2) are inapplicable.....	7
A. The messhall and lodging facilities at the Anaconda Mine do not constitute a "retail or service" establishment within the meaning of section 13 (a) (2).....	7
B. Appellees' employees engaged in the operation of the messhall and lodging facilities for employees at the Anaconda Mine are not employed in a "local retailing capacity" within the meaning of section 13 (a) (1).....	19

CITATIONS

Cases:

<i>Addison v. Holly Hill Co.</i> , 322 U. S. 607, rehearing denied 323 U. S. 809.....	7
<i>Armour & Co. v. Wantock</i> , 323 U. S. 126.....	2
<i>Armstrong Co. v. Walling</i> , 161 F. 2d 515.....	17
<i>Consolidated Timber Co. v. Womack</i> , 132 F. 2d 101.....	1, 8, 10, 16, 20
<i>Fleming v. A. B. Kirschbaum Co.</i> , 124 F. 2d 567, affirmed 316 U. S. 517.....	8
<i>Fletcher v. Grinnell Brothers</i> , 150 F. 2d 337.....	16
<i>Grant v. Bergdorff & Goodman Co.</i> , 172 F. 2d 109.....	17
<i>Hanson v. Lagerstrom</i> , 133 F. 2d 120.....	2, 8, 11, 20
<i>Hawkins v. E. I. DuPont De Nemours & Co.</i> , 192 F. 2d 294.....	2
<i>Helena Glendale Ferry Co. v. Walling</i> , 132 F. 2d 616.....	17
<i>Helliwell v. Haberman</i> , 140 F. 2d 833.....	16
<i>Lassiter v. Guy F. Atkinson</i> , 162 F. 2d 774.....	16
<i>McLeod v. Threlkeld</i> , 319 U. S. 491.....	1
<i>Marlborough Corp. v. United States</i> , 172 F. 2d 787.....	7
<i>Ordinary of State of New Jersey v. United States Fidelity & Guaranty Co. of Baltimore, Md.</i> , 136 F. 2d 536.....	7
<i>Paramount Pest Control Service v. Brewer</i> , 177 F. 2d 564.....	6
<i>Phillips Co. v. Walling</i> , 324 U. S. 490.....	8, 19
<i>Powell v. United States Cartridge Co.</i> , 339 U. S. 497.....	8
<i>Richter v. Barrett</i> , 173 F. 2d 320.....	17
<i>Roland Electrical Co. v. Walling</i> , 326 U. S. 657.....	20

Cases—Continued

	Page
<i>Schwegmann Bros. v. Calvert Distillers Corp.</i> , 341 U. S. 956-----	3
<i>Skidmore v. Swift & Co.</i> , 323 U. S. 134-----	16
<i>Smith v. Porter</i> , 143 F. 2d 292-----	17
<i>Stecone v. Morse-Starrett Products Co.</i> , 191 F. 2d 197-----	7
<i>Stanger v. Vocaflm Corp.</i> , 151 F. 2d 894, 162 A. L. R. 216-----	17
<i>Tobin v. Cherry River Boom & Lumber Co.</i> , 102 F. Supp. 763---	2
<i>Tobin v. Promersberger</i> , 104 F. Supp. 314-----	2
<i>Tripp v. May</i> (not officially reported), 10 Wage Hour cases 1; 19 Labor Cases, para. 66,073, affirmed 189 F. 2d 198-----	17
<i>United States v. Trubow</i> , 196 F. 2d 161-----	7
<i>Waialua Agr. Co. v. Maneja</i> , 178 F. 2d 603, certiorari denied 339 U. S. 920-----	7
<i>Walling v. General Industries Co.</i> , 330 U. S. 545-----	16
<i>Walling v. Morris</i> , 155 F. 2d 832, vacated on other grounds 332 U. S. 422-----	17
<i>Woodruff v. Heiser</i> , 150 F. 2d 873, certiorari denied 326 U. S. 778--	7
Federal Statutes:	
Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910; 29 U. S. C. 201 et seq.:	
Section 13 (a) (1)-----	5, 19
Section 13 (a) (2)-----	5, 7
Miscellaneous:	
95 Cong. Rec. 11116-----	15, 18
95 Cong. Rec. 12490-12491-----	17
95 Cong. Rec. 12501-----	15
95 Cong. Rec. 12502-----	17
95 Cong. Rec. 12505-----	12
95 Cong. Rec. 12510-----	14, 15
95 Cong. Rec. 12520-----	18
95 Cong. Rec. 14868-14874-----	4
95 Cong. Rec. 14870-----	3
95 Cong. Rec. 14877-----	12, 17
95 Cong. Rec. 14942-----	12
Federal Rules of Civil Procedure:	
Rule 52 (a)-----	6
Regulations of the Administrator of the Wage and Hour Division, 29 CFR, 1953 Supp., 541.4-----	5
29 CFR, 1953 Supp., 779-----	13

In the United States Court of Appeals for the Ninth Circuit

No. 14327

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES
DEPARTMENT OF LABOR, APPELLANT

v.

HAROLD S. ANDERSON, JR., ET AL., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR APPELLANT

I

Appellees' contention that the *Womack* and *Hanson* decisions are no longer controlling and authoritative is expressly refuted by the legislative reports on the 1949 amendments to the Act and by recent decisions of the courts

Appellees rely extensively (App. br. pp. 29-33) on the Supreme Court's decision in *McLeod v. Threlkeld*, 319 U. S. 491 as overruling this Court's decision in *Consolidated Timber Co. v. Womack*, 132 F. 2d 101. But the *McLeod* case, as the Supreme Court explicitly stated, was not concerned with the scope of "production of goods for commerce" phase of coverage under the Fair Labor Standards Act, since *McLeod's* duties (cooking food for a railroad maintenance of way crew) were "completely outside that clause" (319 U. S. at 493). And indeed the Supreme Court cited (319 U. S. 493, 501) with ap-

parent approval both the *Womack* case and the Eighth Circuit's decision in *Hanson v. Lagerstrom*, 133 F. 2d 120 holding cookhouse employees of the type here involved to be engaged in the "production of goods for commerce." The inapplicability of the *McLeod* case to cases concerned with the "production of goods for commerce" phase of coverage such as is involved in the instant case is conclusively demonstrated by the Supreme Court's subsequent decision in *Armour & Co. v. Wantock*, 323 U. S. 126, where the Court expressly ruled that:

McLeod v. Threlkeld, * * * which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged "in commerce," and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce (323 U. S. at 131).

That the "production" phase of coverage continues to offer a wider basis for coverage of such employees even under the amended definition is apparent from recent decisions of the courts. See *Hawkins v. E. I. DuPont De Nemours & Co.*, 192 F. 2d 294 (C. A. 4); *Tobin v. Cherry River Boom & Lumber Co.*, 102 F. Supp. 763 (S. D. W. Va., 1952); and *Tobin v. Promersberger*, 104 F. Supp. 314 (D. Minn., 1952).

And as stated in the Government's main brief (br. pp. 28-30), the legislative reports on the 1949 amendments to the Act show clearly that Congress intended to continue coverage of employees of the type involved here and in the *Womack* and *Hanson* cases. Indeed, express approval was given to the *Womack* and *Hanson* cases in the Report of the Majority of the Senate Conferees. Appellees attempt to minimize the significance of this Report by referring to it as "merely a statement of three Senators" submitted after the adoption of the conference bill. (App. br. p. 24.) However, while admittedly there was some disagreement among the Senators concerning the timeliness and effect of the Report, there can be no doubt that it represents the views of the majority of the Senate con-

ferrees, who were the principal sponsors of the bill.¹ And its authoritative force as a significant part of the legislative history of the 1949 amendments to the Act is beyond question. This is clear from the following excerpts from the debates concerning the submission of the Report:

Mr. PEPPER. * * * I offer the statement, which I now again tender on behalf of three of the Senate conferees, *being a majority of the Senate conferees, who were the principal sponsors of the bill*, and who were active in the conference, namely, the chairman of the Committee on Labor and Public Welfare, the distinguished Senator from Utah [Mr. Thomas], the ranking Democratic member of the committee in the conference, the eminent Senator from Montana [Mr. Murray], and the senior Senator from Florida, who was also one of the sponsors of the bill, and was chairman of the subcommittee which handled the legislation in the committee (95 Cong. Rec. 14870, Oct. 18, 1949). [Emphasis added.]

*

*

*

Mr. MORSE. * * * We are dealing here with a conference report. We are dealing with the remarks, the opinions, and the views of the majority of the Senate conferees set out in their report on the bill as it came out of conference. As a matter of legislative history, those views may become of great importance in the future interpretation of the law by the courts of the land (95 Cong. Rec. 14871).

I wish to say to my friend from Nebraska that I am not at all interested in whether or not the views of a majority of the Senate conferees on any bill are acceptable to or are agreed to by any staff member of any committee of the Senate. Mr. Shroyer may be acting for the Senator from Ohio [Mr. Taft] but he cannot act for the Senator when it comes to having his views bind the Senate when this conference report prepared by a

¹ "It is the sponsors that we look to when the meaning of the statutory words is in doubt." See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 394-395, rehearing denied, 341 U. S. 956.

majority of the Senate conferees at the time that the Senate accepts the report of interpretation as it is now submitted by the Senator from Florida [Mr. Pepper]. I am not interested in what Mr. Shroyer's views are with respect to this report. I am interested in what the majority of the Senate conferees say about the minimum wage bill in their report on it.

Mr. WHERRY. Mr. President——

Mr. MORSE. I will not yield at this point.

I wish to say to the Senator from Florida that when a majority of the Senate conferees make a report as to their views with respect to a bill which is being reported by the conferees, that report should stand on its own footing. * * * It is the report of the majority of the conferees. It is not the report of the individual conferees (95 Cong. Rec. 14871, Oct. 18, 1949).

* * *

Mr. PEPPER. * * * When the courts and the Administrator subsequently come to consider this subject, they will have the Congressional Record in the Senate and in the House. They will have the statement of the House managers. They will have the statement of the majority of the Senate conferees; and they will have the individual statement of the Senator of Ohio, to the extent he desires to offer it. If the Senator from Vermont [Mr. Aiken] cares to make any statement, that will be available. All of it, taken together, will constitute part of the historical background of the legislation.

* * *

Mr. WHERRY. * * * In view of the last statement made by the Senator from Florida, that this statement will go in the Record as a statement of the majority of the conferees, I have no objection to it on that ground * * * (95 Cong. Rec. 14871, Oct. 18, 1949).

For a complete report of the debates and circumstances surrounding the submission of the Report see 95 Cong. Rec. 14868-14874, October 18, 1949.

II

The sections 13 (a) (1) and 13 (a) (2) issues are not presented for decision on this appeal since the court below made none of the findings requisite to their applicability

In addition to controverting coverage under the Act, appellees claim exemption from the Act under Sections 13 (a) (1) and 13 (a) (2) relating to employees employed in a "local retailing capacity" or by a "retail or service" establishment (App. br. pp. 58-73). But the court below made none of the factual findings which are requisite to a determination of these exemptions, this being deemed unnecessary in view of the court's disposition of the case on the coverage issue (Findings and Conclusions R. 52-74). It is the Government's contention therefore, that these undecided exemption issues are not presented for decision on this appeal.

The 13 (a) (2) exemption is essentially the exemption provided in the original 1938 Act, with the addition of a detailed definition. The definition prescribes four tests:

1. The establishment must be engaged in making sales of goods or services or of both.

2. Fifty percent of the establishment's annual dollar volume of sales of goods or services must be made within the State in which the establishment is located.

3. Seventy-five percent of the establishment's total annual dollar volume of sales of such goods or services must not be for resale.

4. Seventy-five percent of the establishment's annual dollar volume of sales of goods or services must be recognized as retail sales in the particular industry.

The Section 13 (a) (1) exemption provides an exemption for "any employee employed in a * * * local retailing capacity" as such term is defined and delimited by regulations of the Administrator. The Administrator's regulation (29 CFR, 1953 Supp., 541.4) defines an employee employed in a "local retailing capacity" as one—

- (a) who customarily and regularly is engaged in—

- (1) making retail sales of goods or services of

which more than 50 percent of the dollar volume are made within the State where his place of employment is located, or

(2) performing work immediately incidental thereto, such as the wrapping or delivery of packages; and

(b) whose hours of work of a nature other than those described in paragraphs (a) (1) or (a) (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer.

It will readily be seen that determination of whether or not the messhall and lodging facilities constitute a "retail or service establishment" under Section 13 (a) (2), or whether the employees operating such facilities meet each of the conjunctive requirements for the exemption under Section 13 (a) (1), presents a multiplicity of factual issues which have not been resolved by appropriate findings of the district court as required by Rule 52 (a) of the Rules of Civil Procedure.² Directly in point here in connection with the applicability of the Section 13 (a) (2) exemption is the case of *Tobin v. Celery City Printing Co.*, 197 F. 2d 228 (C. A. 5) where the district court had made no finding that 75 percent of the establishment's sales were "recognized as retail sales in the particular industry." The Fifth Circuit, pointing out that this requirement is "one of the prerequisites of such exemption" reversed the decision of the district court holding the exemption applicable and remanded the cause to the district court "to further consider the question of appellee's exemption as a retail or service establishment."

In view of the lack of essential findings with respect to both the Sections 13 (a) (2) and 13 (a) (1) exemptions, the language employed by this Court in *Paramount Pest Control Service v. Brewer*, 177 F. 2d 564, would seem particularly apt in the instant case. It was there stated:

² 28 U. S. C. A., Rule 52 provides: "In all actions tried upon the facts without a jury * * *, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment, * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." [Emphasis supplied.]

The law is clear that a trial judge is not always required to make findings upon all factual issues that are tendered or that arise in a case. *Kustoff v. Chaplin*, 9 Cir., 1941, 120 F. 2d 551. Nevertheless, where * * * the record shows that there has been an omission in the trial court to find indispensable facts upon which the controversy in law depends, the Court of Appeals will remand the case to have the essential findings supplied by the trial judge. *Hunter v. Scruggs Drug Store, Inc.*, 4 Cir., 1940, 113 F. 2d 971; see also, *Gillis v. Gillette*, 9 Cir., 177 F. 2d 7 (*id.* at 565).

To the same effect are the decisions of this Court in *Marlborough Corp. v. United States*, 172 F. 2d 787; *United States v. Trubow*, 196 F. 2d 161; *Waialua Agr. Co. v. Maneja*, 178 F. 2d 603 certiorari denied 339 U. S. 920; and *Steccone et al. v. Morse-Starrett Products Co.*, 191 F. 2d 197. See also, *Ordinary of State of New Jersey v. United States Fidelity & Guaranty Co. of Baltimore, Md.*, 136 F. 2d 536 (C. A. 3), and *Woodruff v. Heiser*, 150 F. 2d 873 (C. A. 10), certiorari denied 326 U. S. 778.

III

Even if the exemption issues are presented for decision on this appeal it is clear that sections 13 (a) (1) and 13 (a) (2) are inapplicable

A. The messhall and lodging facilities at the Anaconda Mine do not constitute a "retail or service" establishment within the meaning of Section 13 (a) (2)

If it is assumed *arguendo* that the undecided exemption questions are properly before this Court, we submit that the messhall and lodging facilities clearly do not constitute a "retail or service" establishment within the meaning of the Section 13 (a) (2) exemption. The Supreme Court has repeatedly emphasized in decisions under this Act that "Exemptions made in such detail preclude their enlargement by implication." See *Addison v. Holly Hill Co.*, 322 U. S. 607, at 617, rehearing denied, 323 U. S. 809. "Where exceptions were made, they were narrow and specific. * * * Such specificity in stating exemp-

tions strengthens the implication that employees not thus exempted * * * remain within the Act" (*Powell v. United States Cartridge Co.*, 339 U. S. 497, at 517). This principle was specifically applied by the Court to the "retail establishment" exemption in *Phillips Co. v. Walling*, 324 U. S. 490 which, in fact, was the first decision in which the Supreme Court announced that an exemption from this Act is to be "narrowly construed" and not extended to "other than those plainly and unmistakably within its terms and spirit" (324 U. S. at 493).

It is our position that the messhall and lodging facilities here, designed solely for the benefit of the Anaconda mining employees to promote that company's productive operations, fall outside both the letter and the purpose of the exemptive provisions. The language and the legislative history of Section 13 (a) (2), ~~discussed in our main brief~~, controlling decisions, particularly that of this Court in *Consolidated Timber Co. v. Womack*, 132 F. 2d 101, and the administrative interpretation of the exemption provision here involved, reveal plainly what is now settled law—that a "service establishment" is one "which has the ordinary characteristics of a retail establishment except that it sells services instead of goods" (*Fleming v. A. B. Kirschbaum Co.*, 124 F. 2d 567, 572 (C. A. 3), affirmed 316 U. S. 517) and that it is an establishment, "the principal activity of which is to furnish service to the consuming public" (*ibid.*). As the Third Circuit pointed out, "typical retail establishments are grocery stores, drug stores, hardware stores and clothing shops" (*ibid.*); correspondingly typical service establishments are "barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops," or the like.

As in the case of coverage presented in our main brief, we submit that this Court's decision in the *Consolidated Timber Co.* case, *supra*, and the Eighth Circuit's decision in *Hanson v. Lagerstrom*, 132 F. 2d 120, are controlling here. In rejecting a claim for exemption identical to that of the appellees here, this Court, in the *Womack* case at page 107, said:

In our opinion the exemption invoked was not intended to apply in a situation such as confronts us in the instant case. Here the cookhouse was a "necessary"

part of the Company's production of goods for commerce. It was not operating with the intent or purpose of showing a profit to the owners from the sale of food or service, but to render a very necessary assistance to the business of the Company, which was the production of logs in interstate commerce. The cookhouse was not a separate or independent establishment; it was actually a part of the Company's facilities—a link in the chain—whereby it accomplished the purpose of its existence. Neither cookhouse was in competition with any private restaurant for there is no evidence of an effort to secure the patronage of the general public; the service was sold at cost to those whom the cookhouse was intended to serve: the loggers. *The principal activity of the cookhouse definitely was not to furnish service to the consuming public, as such, but was to serve the employees of the Company.* [Emphasis supplied.]

Appellees' insistence (App. br. p. 62) that the "messhall" is a "restaurant" and that the conceded exception for the latter impels exemption for the former, mistakes nomenclature for reality. Unlike cookhouses and messhalls, ordinary restaurants exist to serve the general public rather than to facilitate the productive operations of a particular company. Restaurants are operated for profit, are located at readily accessible sites in a community, and through advertising and other means seek to attract the patronage of the public as a whole. Appellees' facilities, on the other hand, are operated primarily to provide food for the miners; they are subsidized by the Anaconda Company (Fdg. 16, R. 64–65) as integral parts of the main business of mining rather than as separate entities operated by restauranteurs to serve meals to guests. Meal times are adjusted principally to accommodate the needs of the employees of Anaconda whose mine operates on a two-shift basis and whose mill operates on a three-shift basis (Fdg. 3, R. 57). Employees in the mine whose duties make it impractical for them to leave the working area eat their lunches at their place of work (Fdg. 15, R. 64). Approximately 20 to 25 percent of the meals served by appellees consist of box lunches (Plf. Exh. C, R. 49). To a very limited extent and only incidentally does

the messhall serve outsiders (Fdg. 1, R. 53). There are no signs indicating that the messhall is an eating establishment (R. 85) and appellees do no highway advertising of their facilities (Fdg. 5, R. 57).³ Indeed, a sign on one of the access roads to the Anaconda properties warns "children and unauthorized persons" to "keep out" (Plf. Exh. 1, R. 86).

Appellees attempt to portray the messhall as a restaurant by pointing out the fact that it is open to the public (br. p. 71). But the court below specifically found that only occasionally and incidentally are persons other than employees of Anaconda served at the messhall (Fdg. 1, R. 53). And under virtually identical circumstances, this Court rejected such a contention in the *Womack* case holding that the fact that meals at the cookhouse were served to occasional persons who were not employees of the logging camp did not convert the cookhouse into a public restaurant or service establishment. There the district court had held that the cookhouse located at the company's headquarters in Glenwood was exempt because it was frequented by a few members of the public. This Court, in reversing, pointed out that the distinction was not fundamental, and that both cookhouses served "the same basic purpose and integration in the Company business":

If there be any difference, it is but of degree. Each accomplishes the same purpose, each is a unit in the facilities necessary to the Company's production of goods for commerce. The argument that because the Glenwood cookhouse is situated in a village wherein is also located a lunch counter or fountain equipped with a half dozen stools, serving sandwiches and coffee, is not persuasive. No such establishment could supply the necessary meals required by several hundred hungry laborers (132 F. 2d 101 at 107).⁴

³ Only Anaconda "advertises" the facilities, and then the "advertising" is not for the purpose of attracting the public but for the purpose of attracting an adequate supply of labor for its mining operations (Plf. Exh. AA, R. 51).

⁴ In the *Womack* case there were six persons who were not employed in the logging operations but who were employed in other businesses in Glenwood who regularly took their meals at the cookhouse. In addition an average of 10 meals a day were served to strangers—the general public [132 F. 2d at 106]. In the instant case an average of only 168 meals per month or 5%

And in *Hanson v. Lagerstrom*, 133 F. 2d 120 (C. A. 8), the facts reveal that from 4 to 6 meals a day were served to the public. The Eighth Circuit, however, made short shrift of defendant's contention there that under these circumstances the cookhouse was a service or place of retail business. Said the court at page 122:

* * * In other words, the service to the public was incidental and so negligible and relatively unimportant that the exemption involved cannot apply.

* * *

* * * If, among his activities, defendant maintained a restaurant operated without reference to his industrial activity, it should then not be regarded as part of his business subject to the Act. The cookhouse was intended primarily for the benefit of defendant's logging employees and to increase his production operations. It is certainly not a typical retail establishment.

That the ruling of the *Womack* and *Hanson* cases is still controlling and authoritative with respect to the applicability of Section 13 (a) (2) to cookhouses in isolated logging or mining camps was made clear in the legislative reports on the 1949 amendments to the Act. Thus, Senator Holland, who sponsored the adopted amendment made the following remarks:

Mr. HOLLAND. The amendment which we have introduced has been a product of several months work and discussion. It was placed in its present form some 2 months ago and has had wide circulation. I have had numerous inquiries as to its effect upon various situations and its effect upon various court decisions. I have been asked the following questions:

* * *

Question. In *Boutell v. Walling* (327 U. S. 463) the Supreme Court held that a repair establishment, affili-

meals per day were served to outsiders (Fdg. 5, R. 57). In addition, the lodging facilities here are limited exclusively to employees of the Anaconda Company (Fdg. 5, R. 58).

ated with an interstate motor carrier and engaged exclusively in repairing the trucks of such motor carrier was not exempt as a service establishment. Would that case be decided any differently under the proposed amendment?

ANSWER. No; for the reason that the servicing of such a repair establishment would not be recognized as retail in the industry. This is so because such establishment is not open to the general public *and is really the same as a repair department operated by the interstate motor carrier itself*. A repair establishment affiliated with an interstate motor carrier is not like a garage patronized by auto and truck owners generally (95 Cong. Rec. 12505, August 30, 1949). [Emphasis supplied.]

That this is a general principle, not restricted to this one situation, but applicable equally to other similarly affiliated facilities is made clear by the generality of the language in the Report of the Majority of the Senate Conferees where it is stated:

The conference agreement exempts establishments which are traditionally regarded as retail. Establishments which are not ordinarily available to the general consuming public (such as the motor-carrier repair affiliate considered in *Boutell v. Walling* (327 U. S. 463) * * * will not become retail or service establishments under the provisions of the conference agreement" (95 Cong. Rec. 14877, October 18, 1949).

Similarly, Mr. Lesinski, one of the managers on the part of the House, in explaining the effect of the amendments after conference agreement stated:

The conference agreement does not change the status, insofar as the retail or service exemption is concerned, of establishments which are not ordinarily available to the general consuming public (95 Cong. Rec. 14942, October 18, 1949).

Appellee cites at great length those portions of the legislative history which admittedly indicate that sales of an establish-

ment are not *necessarily* to be regarded as nonretail because made to a business customer (br. pp. 67-70, appendix pp. 4-8). But these excerpts do not meet the issue here involved. What is important here is the legislative history clearly showing that where, as in the *Womack* and *Hanson* cases and in the instant case, an establishment is operated as an adjunct to the principal business of an employer and does not serve the consuming public generally, it is not the type of establishment contemplated by the amended Section 13 (a) (2), since there is no concept of retailing applicable to its sales or services.

The administrative interpretation of the amended "retail establishment" exemption is, of course, squarely contrary to appellee's contention. Those interpretations are contained in a comprehensive interpretative Bulletin, "Retail and Service Establishment and Related Exemptions," 29 CFR, 1953 Supp., 779; 15 F. R. 7245. There on the basis of "(1) The legislative history of the exemption as originally enacted in 1938 and the legislative history of the 1949 amendments to the exemption; (2) the decisions of the courts during the past eleven years, and (3) the Administrator's experience during the past eleven years in interpreting and administering the exemption" (Section 779.8 (f)), the Administrator has set forth certain standards and criteria for determining generally and in some cases specifically what sales or services are recognized as retail sales or services in particular industries. Specifically with respect to isolated lumber camps or mines which maintain cookhouses and bunkhouses to feed and house their employees it is stated:

* * * In those cases the employer operates an adjunct which is directly related to the principal business and the furnishing of the facilities is an integral and an indispensable part of the principal operations. Failure to provide such facilities would make continued operations virtually impossible. In such situations the employer does not satisfy the wants of the employees as part of the general consuming public but in order to enable him to carry on his business. Such establishments are not retail or service establishments within the meaning of the exemption (Section 779.9 (d)).

The terms of the statute and the legislative history show clearly that it was properly the function of the Administrator to interpret, as he did here, the exemption provision in question, and that the industry may not provide exemption for itself by a unilateral decision of what it recognizes as retail. "Recognized * * * *in the particular industry*" [emphasis supplied] is language carefully chosen. It does *not* mean, nor was it ever intended to mean, recognized *by* the particular industry. This was made clear by the explanation of Senator Holland, the sponsor of the section as it now appears in the Act. When responding to Senator Aiken's inquiry "Who does the recognizing?," Senator Holland explained: "The Administrator, the courts, the merchant, his employees, the enforcement officer, and everyone else." Senator Aiken asked:

Then we have the Senator's assurance that this wording is clearly not intended to permit any industry to determine for itself what are generally recognized as retail sales?

Mr. HOLLAND. No. We discussed that matter earlier in the afternoon. There could be various criteria which could be applied, one of which of course would be the conclusion of the trade association in the particular industry. But that is only one criterion. Others would apply (95 Cong. Rec. 12510).

Senator Aiken, who became one of the Managers on the Part of the Senate who made the Conference Report of the amendments as enacted, then added: "If these words would permit each industry to decide for itself whether sales were retail or not, I could see considerable objection to the amendment" (95 Cong. Rec. 12510).

It is thus unmistakably clear from the legislative history that the application of this exemption is not to be resolved solely on the basis of the self-interested opinions of the industry claiming the exemption on behalf of a particular employer. In response to fears expressed by some of the Senators that interested trade associations or employers would determine what is "retail" in their industries, Senator Holland made repeated assurances that while the trade association's interpretation

might be "one criterion," no one "and certainly not the Senator from Florida [the main sponsor of the provision as enacted], would wish to delegate full authority in the matter to a trade association or any other interested group" (95 Cong. Rec. 12501). For a more comprehensive discussion and excerpts from the debates see the Department's Interpretative Bulletin on this exemption, 29 CFR, 1953 Supp., 779.8. According to Senator Holland, it was contemplated that it would be the function of the Administrator to make the initial determination of what is recognized as retail in a particular industry, basing his decision on a variety of considerations, including matters of common knowledge, his own judgment derived from his specialized experience, trade association views and practices, and also the views of the "employee who has rights under the bill, if he sees something happening in the name of retail business which he knows is not retail business * * *" (95 Cong. Rec. 12510). In this connection, it may be noted that it is most unlikely that the employees in appellee's messhall and lodging facilities at the remote and isolated Anaconda mine would regard their services as "retail."

In answer to a question by Senator Douglas inquiring who is to define what is recognized as retail sales or services in the particular industry, Senator Holland replied "Who but the Administrator?" (95 Cong. Rec. 12501), observing that there would, of course, always be "access to the courts" if the individual person concerned did not regard the administrative ruling sound (*ibid*). Representative Lucas, commenting on the practical difficulties involved in determining the question of recognition in the particular industry said:

The other charge against my amendment has been that it would make the exemption difficult, if not impossible, to apply, because years of litigation would be required to ascertain what is recognized as a retail sale in various industries. This charge is completely baseless. The Administrator, through his 11 years of administration of the existing law has come to know quite well what sales and services are recognized as retail in each particular industry (95 Cong. Rec. 11116).

The net import of the legislative debates on this point clearly reflects the intent to give particular weight to the interpretation of the Administrator who is in a position to receive the variety of interested views, and to acquire the specialized experience reflecting a much broader base from which to make an informed judgment of the actual practices in the industry than the district court can possibly acquire from a single case. In this special situation, therefore, there is particularly forceful reason for giving to the administrative interpretation the great weight commended by the Supreme Court in *Skidmore v. Swift & Co.*, 323 U. S. 134, 139-140:

* * * the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case.
* * *

We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling on the courts by reason of their authority, do constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance.

The sparse evidence adduced by appellee in support of the claimed exemption is wholly insufficient to controvert the application of the Administrator's administrative interpretation to the instant case. It is no more than an effort to substitute for the Administrator's judgment in defining the meaning of "retail" the judgment of an interested member of the industry. In addition, even this meager evidence must be appraised in the light of the basic principle governing every exemption from this Act—that "the employer has the burden of proof on that issue." *Helliwell v. Haberman*, 140 F. 2d 833, at 834 (C. A. 2), specifically approved on this point in *Walling v. General Industries Co.*, 330 U. S. 545, at 548, n. 7.⁵

⁵ That the employer has a strict burden of proving a claim of exemption from this Act has been repeatedly emphasized by the courts of appeals, including this Court. See *Lassiter v. Guy F. Atkinson*, 162 F. 2d 774 at 778 (C. A. 9); *Consolidated Timber Co. v. Womack*, 132 F. 2d 101 at 106 (C. A. 9); *Fletcher v. Grinnell Brothers*, 150 F. 2d 337 (C. A. 6), cited with approval

The burden of proof rule has particular significance in construing the amended "retail establishment" exemption in Section 13 (a) (2), because Congress, as evidenced by its debates and reports on this provision, explicitly indicated its reliance upon this rule to make the application of the exemption administratively workable. Specifically with respect to the requirement that the sales of the establishment claiming exemption be "recognized as retail * * * in the particular industry," it was emphasized that the burden of showing this factor was to be placed on each employer claiming the exemption. Thus, the statement of the Majority of the Senate Conferees on the Conference Report of the Amendments as enacted recites unequivocally:

It is the intent of the conference agreement to place on each *employer* claiming the exemption the *burden* of showing that 75 percent of the particular establishment's sales are not for resale *and* are recognized as retail in the particular industry (95 Cong. Rec. 14877). [Emphasis supplied.]

Further, Section 13 (a) (2) in precisely its present form was offered on the floor of the Senate by Senator Holland, of Florida, on behalf of himself and five other Senators. See 95 Cong. Rec. 12490-12491. In explanation of this amendment Senator Holland stated:

* * * An *employer* claiming exemption would have the *burden* of proving to the courts that, in fact, 75 percent of his sales or services are recognized as retail in his industry (95 Cong. Rec. 12502). [Emphasis supplied.]

on this point in *Walling v. General Industries Co.*, 330 U. S. 545, at 548, n. 7; *Armstrong Co. v. Walling*, 161 F. 2d 515 (C. A. 1); *Stanger v. Vocafilm Corporation*, 151 F. 2d 894, 162 A. L. R. 216 (C. A. 2); *Grant v. Bergdorf & Goodman Co.*, 172 F. 2d 109 (C. A. 2); *Richter v. Barrett*, 173 F. 2d 320 (C. A. 3); *Walling v. Morris*, 155 F. 2d 832 (C. A. 6); vacated on other grounds, 332 U. S. 422; *Tripp v. May* (not officially reported), 10 W. H. Cases 1; 19 Labor Cases, par. 66,073 (N. D. Ill., 1950), affirmed 189 F. 2d 198 (C. A. 7); *Smith v. Porter*, 143 F. 2d 292 (C. A. 8), specifically approved on this point in *Walling v. General Industries Co.*, 330 U. S. 545, at 548, n. 7; *Helena Glendale Ferry Co. v. Walling*, 132 F. 2d 616 (C. A. 8).

The proposed amendment of Senator Holland was passed by the Senate without change. See 95 Cong. Rec. 12520.

Similarly, the chief proponent of this proposal in the House Representative Lucas, assured his colleagues:

* * * The *employer* claiming exemption would have the *burden* of proving that at least 75 percent of his sales are recognized as retail in his industry (95 Cong. Rec. 11116). [Emphasis supplied.]

Appellee plainly did not meet this burden of proof. Its evidence on this point consisted entirely of testimony concerning the self-serving position taken by the industry. Thus, Mr. Armin Kusswurm, Secretary of the National Restaurant Association, testified that the "Anderson operation" falls within the Association's definition of "restaurant" as defined in the Association's bylaws (R. 150); that the "Anderson organization" is a member of the Association and that "in the restaurant industry a retail sale is a sale or service of a meal to the consumer, and generally consumed on the premises of the establishment" (R. 154). Under this definition he stated that the function performed by the Anderson facility would be considered retail sales or services.

Appellees assert that evidence was also offered showing that the United States Census Bureau and the United States Office of Price Administration during its existence recognized that appellees' sales and services are retail sales or services in the industry (App. br. p. 63). Here again the "evidence" to which appellee refers consisted solely of Mr. Kusswurm's expression of *his* opinion that the Anderson facilities would be included under the designation of "In-plant Food Service Contractor" as listed by the Bureau of Census in its classification of retail trades, and *his* opinion that the Anderson facility would come under the designation of "On-the-job feeding or industrial feeding", a term employed by the Office of Price Administration for obtaining statistics for purposes of food rationing (R. 153-154). Even Mr. Kusswurm recognized that an eating establishment could be non-retail under certain circumstances, as is apparent from the colloquy between him and the court which appears on pages 154-155 of the record.

In addition, it was revealed upon cross-examination that Mr. Kussworm also acts as general counsel for the Association and that he had corresponded with appellees over a period of time in connection with the instant case (R. 156). Under these circumstances his testimony could hardly be considered disinterested and unbiased.

Appellant's only other witness on the exemption issue was Mr. William D. Bradford, secretary of the Southern California Restaurant Association. It was stipulated that this witness' testimony would be to the same effect as that of Mr. Kussworm regarding the position taken by the industry in the Southern California area (R. 160, 161).

B. Appellees' employees engaged in the operation of the messhall and lodging facilities for employees at the Anaconda mine are not employed in a "local retailing capacity" within the meaning of Section 13 (a) (1)

Appellees' employees were not employed in a "local retailing capacity" within the exemption provided by Section 13 (a) (1) any more than they were employed by a "retail or service establishment" under Section 13 (a) (2). Both the terms and the context of Section 13 (a) (1) clearly indicate that it is limited to "local retailing" of the same character as that carried on by a "retail or service establishment." Indeed, the Supreme Court has expressly recognized that the two exemptions are merely complementary and were intended to exempt only employees engaged in traditionally "local retailing" capacities. Thus, it stated in *Phillips Co. v. Walling*, 324 U. S. 490 at 497:

* * * Congress was interested in exempting those regularly engaged in local retailing activities and those employed by small local retail establishments, epitomized by the corner grocery, the drug store and the department store. * * * Section 13 (a) (2) is a part of the Act *only* because of the fear that Section 13 (a) (1), in exempting employees regularly engaged in a "local retailing capacity," did not clearly exclude those employed by local retailers who are situated near state lines and who make occasional interstate sales. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 571.

Section 13 (a) (1), as in the case of Section 13 (a) (2), refers to retail sales or services to the general consuming public, and not to services which are an essential and integral part of the production or manufacturing process. As pointed out *supra*, as well as in the Government's main brief on the coverage question, the furnishing of the messhall and lodging facilities in the instant case is plainly not for the general consuming public. It is, on the contrary, simply an essential part of Anaconda's mining operation, i. e., a component of interstate production and not local retailing. As the Supreme Court held in *Roland Electrical Co. v. Walling*, 326 U. S. 657, it was plainly not contemplated that the exemption should apply to the furnishing of goods and services which constitute an integral part of the production operations of a producer of goods for commerce. Thus, it stated:

To fail to cover in this Act the multitude of employees who are engaged in establishments like that of the petitioner and which supply the materials and services currently needed for the maintenance of productive machinery used by those who produce goods for interstate commerce would take the heart out of the Act (326 U. S. at 658).

See also this Court's decision in *Consolidated Timber Co. v. Womack*, 132 F. 2d 101, and *Hanson v. Lagerstrom*, 133 F. 2d 120 (C. A. 8), discussed *supra* at pp. 8-11.

Respectfully submitted.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
WILLIAM W. WATSON,
Attorney,
United States Department of Labor,
Washington 25, D. C.

KENNETH C. ROBERTSON,
Regional Attorney.

DECEMBER 1954.

No. 14327

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR,

Appellant,

vs.

HAROLD S. ANDERSON, JR., *et al.*,

Appellees.

PETITION FOR REHEARING.

GIBSON, DUNN & CRUTCHER,
WILLIAM FRENCH SMITH,
JAMES J. RYAN,

634 South Spring Street,
Los Angeles 14, California,

Attorneys for Appellees.

FILED

SEP 23 1955

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

PAGE

I.

The court did not rule upon or consider in its opinion whether appellees' employees are exempt under Section 13(a)(1) of the Act	3
--	---

II.

The applicability of the retail or service exemption cannot be determined by applying the same tests which determine whether the employees are covered by the Act.....	8
--	---

III.

The test as to whether the activities of appellees' employees were closely related and directly essential to the production of goods for commerce was improperly applied.....	14
A. The court did not apply the full test established by the act, namely, that the activities of appellees' employees must be part of a closely related process directly essential to the production of goods for commerce.....	14
B. The decision was based upon factual conclusions contrary to facts established either by stipulation or by controverted evidence	15
C. The court states the test of coverage to be whether there is a "substantial need" for appellees' facility, a test different from that provided by the Act.....	18

IV.

A recent decision of the Tenth Circuit Court of Appeals, decided after the instant case was submitted, is persuasive authority here and should be considered by the court.....	24
--	----

Appendix. Pertinent excerpts from Section 13(a)(2)....App. p.	1
---	---

TABLE OF AUTHORITIES CITED

CASES	PAGE
Juarez v. Kennecott Copper Corp., No. 5047, 12 WH Cas. 607	24, 25
Kuhn v. Canteen Food Service, 77 Fed. Supp. 585.....	20
McComb v. Factory Stores Co., 81 Fed. Supp. 403.....	21, 23
McLeod v. Threlkeld, 319 U. S. 491, 87 L. Ed. 1538.....	19, 20
Tipton v. Bearl Sprott Co., 175 F. 2d 432.....	10, 20

MISCELLANEOUS

95 Congressional Record, p. 11216.....	23
95 Congressional Record, pp. 14928, 14929	22
95 Congressional Record, p. 14936.....	15
House Report No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949.....	22

REGULATIONS

29 Code of Federal Regulations, Chap. V, Part 776, Sec. 18 (b)	18
29 Code of Federal Regulations, Chap. V, Sec. 541.4.....	4
29 Code of Federal Regulations, Chap. V, Sec. 776.17.....	14
29 Code of Federal Regulations, Chap. V, Sec. 779.28.....	7

STATUTES

Fair Labor Standards Act, Sec. 3(j).....	23
Fair Labor Standards Act, Sec. 13(a)(1)	1, 3
Fair Labor Standards Act, Sec. 13(a)(2).....	7, 8, 9, 10, 11, 13

No. 14327

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED
STATES DEPARTMENT OF LABOR,

Appellant,

vs.

HAROLD S. ANDERSON, JR., *et al.*,

Appellees.

PETITION FOR REHEARING.

*To the Honorable United States Court of Appeals for the
Ninth Circuit, and to the Judge Thereof:*

Appellees respectfully petition this Court for a rehearing of the decision filed in this matter on August 25, 1955. Appellees urge that this petition be granted for the following principal reasons:

(1) The Court erred in failing to consider or decide whether the employees involved were exempt under Section 13(a)(1) as being engaged in a local retailing capacity.

The tests which are specified in the Act and in the Regulations to determine each of these exemption questions are wholly different from those relating to the coverage question. *In neither case is the fact that the facility is found to be an integrated part of the Anaconda*

enterprise a material consideration. Nor are such factors as the location of the business or the availability of other facilities relevant. Indeed, the tests for each type of exemption are different from the other.

(2) The Court erred in determining that Appellees' facility was not a retail or service establishment upon the same basis that it determined that the activities of the employees involved were covered by the Act, namely, that the facility is an integrated part of the Anaconda enterprise.

(3) The test as to whether the activities of the employees involved were closely related and directly essential to the production of goods for commerce so as to bring them within the coverage of the Act, was improperly applied.

(a) The decision was based upon factual conclusions contrary to facts established either by stipulation or by uncontroverted evidence.

(b) The Court did not apply the full test established by the Act, namely, that the activities of Appellees' employees must be part of a *closely related process* directly essential to the production of goods for commerce.

(c) The Court erred in stating the test of coverage to be whether there is a "substantial need" for Appellees' facility, a test different from that provided by the Act.

(4) A recent decision of the Tenth Circuit Court of Appeals, decided after the instant case was submitted, is persuasive authority here and should be considered by the Court.

I.

The Court Did Not Rule Upon or Consider in Its Opinion Whether Appellees' Employees Are Exempt Under Section 13(a)(1) of the Act.

Section 13(a)(1) exempts from the relevant sections of the Act any employee employed in a local retailing capacity. Although raised in Appellees' brief, the Court did not consider the application of this section.

Under this exemption the job duties of the particular employee in question must be considered. If these duties are of a retailing nature as defined by the Administrator, the exemption must apply. *The fact that an employee is employed by a facility which is a part of a non-retail establishment or by one integrated with a producer of goods for commerce, is immaterial in determining whether he is exempt.* Neither are such considerations as the location of the enterprise or the availability of other facilities.

Section 13(a)(1) provides:

"The provisions of Section 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, . . . (as such terms are defined and delimited by regulation of the Administrator): . . ."

The Administrator of the Act was given specific authority to establish the criteria for this exemption. He has done so as follows:

"The term 'employee employed in a bona fide * * * local retailing capacity,' in Section 13(a)(1) of the Act, shall mean any employee:

“(a) who customarily and regularly is engaged in:

“(1) Making retail sales of goods or services of which more than 50 per cent of the dollar volume are made within the state where his place of employment is located, or

“(2) Performing work immediately incidental thereto, such as the wrapping or delivery of packages; and

“(b) whose hours of work of a nature other than that described in paragraphs (a)(1) or (2) of this section do not exceed 20 per cent of the hours worked in the workweek by nonexempt employees of the employer.”

29 C. F. R. Chap. V, §541.4.

It has been *stipulated* that more than 50%, indeed 100%, of the dollar volume of sales of goods or services are made within the State of California, the place of employment [Tr. 29, 73]. It has also been stipulated that all of the meals served, goods sold or lodging furnished by Appellees are to persons who consume such meals or goods or utilize such services locally. [Tr. 29, 73]. Over 75% result from the dining and commissary operations alone [Tr. 64-65]. There can be no question that by very definition such are retail sales and services. Nor can there be any question that each employee performs work immediately incidental to, indeed directly involved in, the sale of such goods or services. Not only 80%, but 100%, of the hours of work are involved in such activities.

In view of the facts, most of which have been stipulated, and the uncontroverted evidence, it is quite clear that each of the employees of Appellees are exempted according to the tests established by this section. The duties of such employees are described in the Stipulation of Facts [Tr. 27-29], and were incorporated in the Findings of Fact [Tr. 66-68] as follows:

“Chef: * * * The chef is responsible for preparation of all foods and efficient serving thereof. In collaboration with the manager, he makes up daily menus. He is directly responsible for the dining room and kitchen crew and he has the authority to hire and fire in his department. He makes up requisitions for supplies and on occasion prepares food to take out by anybody who desires to buy food to take out. He also has the authority to make local purchases if needed. He also prepares all bakery products with the exception of bread.

“Second Cook: * * * The second cook assists the chef in the preparation of all foods, including bakery products. It is customary for him to prepare the morning breakfast so that the chef can come in at a later hour. The second cook is capable of taking over the chef’s job when the occasion demands. This can happen and does happen once in a while. The second cook works under the direct orders of the chef and does any and all work assigned to him by the chef.

“Dishwasher: * * * The dishwasher washes dishes. He is responsible for his dishwashing department and the dishwashing machine and other

equipment installed therein. He also does general clean-up work in and around the kitchen as required. He also washes pots and pans as required.

“Waiter: * * * A waiter serves food to the customers seated at tables in the dining room. Each waiter has a station consisting of four tables of eight places each. A waiter keeps his station clean, cleans the tables after each meal and resets them. He also, with other waiters, sweeps the dining room and once or twice a week mops the dining room floor.

“Combination Man: * * * This man is qualified to wait on tables and to wash dishes but his primary job is to help keep the kitchen and the equipment clean. This man also peels vegetables and does miscellaneous odd jobs delegated to him by the chef. He also helps to unload supply trucks and stores supplies in the storeroom.

“Janitor: * * * A janitor does janitor work. He is responsible for keeping the dormitory building clean and in order. He makes beds, handles linens and blankets and miscellaneous bedding. He sweeps floors, keeps bathrooms and showers clean and does related work. He also, on occasion, relieves the commissary clerk.”

According to undisputed facts alone and in accordance with the Administrator's regulations the employees are exempt as engaged in a local retailing capacity.

The nature of the employer's business under this exemption has little or no bearing. The Administrator himself has recognized that this is the interpretation required by the specific language of the Act.

The Administrator has stated:

“* * * . . . the section 13(a)(1) local retailing capacity exemption depends on the capacity in which the particular employee is employed, and not on the character of the establishment in which or by which he is employed. It is not material, therefore, in determining the applicability of the section 13(a)(1) exemption to any particular employee, whether the establishment in which or by which he is employed is a retail or service establishment or a wholesale or a manufacturing establishment. Thus, for example, an employee of a wholesale or a manufacturing establishment who is employed in a local retailing capacity as that term is defined by the Administrator, may be exempt from the wage and hours provisions of the Act even though the other employees of the establishment are nonexempt. * * *”

29 C. F. R. Ch. V, §779.28.

This exemption, therefore, as is true of Section 13(a)(2), cannot be disposed of as part of the determination concerning the coverage question. Whether the facility is or is not an integrated part of the Anaconda enterprise is irrelevant. It is necessary that a rehearing be granted to consider this question.

II.

The Applicability of the Retail or Service Exemption Cannot Be Determined by Applying the Same Tests Which Determine Whether the Employees Are Covered by the Act.

In determining that the Appellees' facility was not a retail or service establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act, the Court said:

"However, we are of the opinion that the evidence conclusively establishes, as we have concluded, that the facility is an integrated part of the Anaconda enterprise and that such conclusion is inconsistent with any conclusion that it is a retail enterprise." (pages 6-7 of the Opinion.)

But the tests for determining what constitutes a retail or service establishment are *entirely different* from and independent of those determining whether an employee's activity is closely related or directly essential to the production of goods for commerce.

The test for determining whether the employees involved are covered by the Act is whether or not they were employed "in any closely related process or occupation directly essential to the production" of goods for commerce. In applying this test factors such as remoteness, availability of other facilities and integration with the producer for commerce may be considered relevant.

But once it is decided that the employees are covered by the Act such factors are no longer material. It is then necessary to apply the tests specifically enumerated in Section 13(a)(2) of the Act to determine whether or not the *establishment* employing such employees is a retail or service establishment as defined by that section. These

tests are wholly independent of any determination concerning the coverage of the Act. To decide both questions without an independent consideration of the specified factors established as criteria by Section 13(a)(2) is to read that section out of the Act contrary to the clear Congressional mandate.

Section 13(a)(2) of the Act provides:

“Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment’s annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A ‘retail or service establishment’ shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . .”

This definition sets up three criteria only to determine what constitutes a retail or service establishment:

(1) Whether more than 50% of the establishment’s annual dollar volume of sales of goods or services are made in California.

(2) Whether 75% or more of the establishment’s annual dollar volume of sales of goods or services, or both, are for resale.

(3) Whether 75% or more of the establishment’s sales or services are recognized as retail sales or services in the particular industry.

The text of the House Manager’s Statement reporting on the House-Senate conference bill which contained the 1949 amendments as enacted into law by signature of the

President on October 26, 1949, is very relevant in explaining the requirements of Section 13(a)(2). Pertinent excerpts from this statement are set forth in the Appendix.

When the *Womack* case was decided, the tests applicable to the coverage and to the retail exemption questions were both very general although quite different even then. The 1949 amendments, however, establish specific criteria for determining the retail exemption question. These criteria are unrelated to those relevant to the coverage question.

For example, the Court in the instant case quotes from *Tipton v. Bearl Sprott Co.* (9 Cir., 1949), 175 F. 2d 432, 435 in pointing out that the applicability of the Act “is determined, not by the nature of the employer’s business, but by the character of the employee’s activities” (page 3 of the Opinion). This is one of the bases of the Court’s decision concerning the coverage question.

Yet, in determining whether the retail or service exemption applies it is the nature of the employer’s business and *not* the character of the employee’s activities which is controlling.

With respect to the facts which bear upon this issue, the Court refers only to the testimony of one witness and then not in connection with the purpose for which that testimony was introduced along with other substantial evidence, namely, to establish the third requirement of Section 13(a)(2).

The first two criteria set up by Section 13(a)(2) were established by stipulation and incorporated in the Findings of Fact as follows:

“All of defendants’ annual dollar gross income at their Darwin operation results from the furnishing of goods and services within the State of California.

“All of the meals served, goods sold or lodging furnished by defendants at their Darwin operation are to persons who consume such meals or goods or utilize such services in the Anaconda area and within the State of California.” [Tr. 29, 73.]

Indeed over 75% of the total annual dollar volume results from the dining and commissary operations alone [Tr. 64-65].

It was therefore only necessary to establish the third requirement, namely, that 75% or more of the annual dollar volume of sales of goods or services were recognized as retail sales or services in the particular industry. This was established by substantial, uncontradicted evidence, indeed the only evidence which was available.

The testimony of the official of the National Restaurant Association was only a part of this evidence and was adduced not to show that the facility constituted a retail establishment under the Act but to show that the sales of goods and services were recognized and known as retail sales and services in the restaurant industry. That this is most relevant testimony is shown by the Congressional history of the 1949 amendments. Senator Holland, who was the sponsor in the Senate of the amendment to Section 13(a)(2), which was later enacted into law, said in debate on the amendment concerning the practice of a trade association:

“Mr. Douglas: Its interpretation would be very persuasive, would it not, even if not controlling?”

Mr. Holland: Yes, it would be quite persuasive.”
(95 Cong. Rec. p. 12501.)

Appellees introduced the following substantial evidence to show the existence of the third criterion for exemption. This evidence is uncontradicted.

(a) Testimony and documents establish that the United States Bureau of Census in its 1948 Census of Business and its proposed 1953 Census of Business placed Appellee's type of activity in the category of a retail trade [Tr. 152-153; Def.-App. Ex. F.]

(b) Testimony and documents were introduced to show that the United States Office of Price Administration during the period of its existence, included Appellees' type of establishment in its survey and compilation of statistics concerning the restaurant industry [Tr. 153-154; Def.-App. Ex. G].

(c) The testimony of the Secretary and General Counsel of the National Restaurant Association who testified among other things that Appellees were members of that Association; that the term "retail sale or service" has a recognized meaning in the restaurant industry; that such term is defined as the sale or service of a meal to the consumer generally consumed on the premises of the establishment; that Appellees' sales and services are included within this definition and are recognized and known as retail sales and services in and by the restaurant industry; that the type of establishment operated by Appellees was part of the restaurant industry and participates in the activities of the Association in the same manner as its other types of operations; that Appellees' and similar operations are treated as part of the restaurant industry for the purposes of publications, conventions and other activities. Various documents were introduced as further proof of the foregoing [Tr. 148-154; Def.-App. Exs. A to E, incl.].

(d) It was stipulated that the Secretary of the Southern California Restaurant Association would testify sub-

stantially the same with respect to the Southern California area [Tr. 150, 160-161; Def.-App. Ex. H].

The evidence shows that the trade associations of which Appellees are a part both national and state, the United States Census Bureau and the United States Office of Price Administration during its existence, all recognized that Appellees' sales and service are retail sales or services in the industry of which Appellees are a part.

Appellant did not introduce a single item of evidence to rebut this proof.

In order to show that the retail or service exemption applied it was necessary for Appellee to show only the existence of three specified criteria. Two were established by stipulation and the third by substantial and uncontradicted testimony. There is therefore no proper basis for concluding that Section 13(a)(2) is inapplicable to Appellees' establishment.

The availability of other facilities, remoteness, integration with the Anaconda enterprise and similar factors which were the basis of the Court's decision on the coverage question, are not relevant considerations in determining whether the Section 13(a)(2) exemption is applicable.

The basis upon which the court determined the exemption questions makes Section 13(a)(2) meaningless. The Court in its Opinion has not considered the specified requirements of that section or the facts established by stipulation and by uncontradicted evidence relating to those requirements. Nor has it considered the significance of the fact that it is the *establishment*, not the activities of the employees, which controls the application of the exemption.

We respectfully urge that the foregoing reasons justify a reconsideration of this case by the Court.

III.

The Test as to Whether the Activities of Appellees' Employees Were Closely Related and Directly Essential to the Production of Goods for Commerce Was Improperly Applied.

- A. The Court Did Not Apply the Full Test Established by the Act, Namely, that the Activities of Appellees' Employees Must Be Part of a Closely Related Process Directly Essential to the Production of Goods for Commerce.

The Administrator himself has held that, in addition to a finding concerning the "directly essential" nature of the employees' activities, a finding must also be made that such activities are part of a "closely related process." There is a definite and clear distinction between the two.

"The Amendments deleted the word 'necessary' and substituted the words 'closely related' and 'directly essential' contained in the present law. * * * Under the amended language, an employee is covered if the process or occupation in which he is employed is *both* 'closely related' and 'directly essential' to the production of goods for interstate or foreign commerce.

* * * * *

"Not all activities that are 'closely related' to production will be 'directly essential' to it, nor will all activities 'directly essential' to the production meet the 'closely related' test."

29 C. F. R., Ch. V, §776.17.*

It is clear from the Congressional history that the framers of the 1949 Amendments intended that for an

*Emphasis ours unless otherwise indicated.

employee to be covered he must be engaged in a process closely related to the production of goods for commerce. In debates in the House concerning the conference bill later enacted into law, Mr. McConnell, one of the House Managers, in reporting to the House on the conference bill stated as follows:

“First—and this is important—the coverage of the act for a large number of employees is dependent upon the definition of ‘production of goods and commerce.’ A substantial change has been made in this definition which will have the effect of preventing the Administrator and the courts from extending the coverage to occupations which are not closely related *and* directly essential to production.” (95 Cong. Rec. 14936.)

The Court does not consider in its opinion or decide that the activities of the employees involved are closely related to the production of goods for commerce.

We respectfully submit that the activities of employees involved were not closely related to the production of goods for commerce and urge that a consideration of this question is required.

B. The Decision Was Based Upon Factual Conclusions Contrary to Facts Established Either by Stipulation or by Uncontroverted Evidence.

The Court on page 4 of its Opinion states:

“However, in each instance the facility furnished was without a question needed, and without it the production would have been affected.”

But the Findings of Fact which are based upon stipulated facts and uncontradicted evidence are specific that

the effect upon production would not be substantial even if Appellees' facilities were abandoned entirely.

Finding of Fact No. 19 states:

"In the event that the sales and services provided by [Appellees] at their Darwin operation should be curtailed or abandoned entirely there would be only a temporary inconvenience to the operation of the mine; the effect upon production at the mine would be unsubstantial even during this temporary period. There would be no significant effect upon total shipments from the mine, particularly in view of stocks of ore that are kept in reserve. During the period of a recent strike threat some 20 to 25 employees terminated their employment. Shipments from the mine were not affected as a result thereof." [Tr. 68-69.]

The trial court, again based upon stipulation or uncontradicted evidence, further found that:

Only 20 to 25% of the employees employed by Anaconda utilize Appellees' facilities at all [Tr. 55].

Almost one-half the number of employees living at Appellees' facilities live in neighboring communities and commute daily to and from the mine [Tr. 55-56].

Fifty per cent of the employees who live at Appellees' facilities own their own automobiles and the remaining employees ride with them when there is a need or occasion for transportation [Tr. 58-59].

All of the communities involved are connected by paved two-lane highways open all year [Tr. 58-63].

The children of mine employees attend school daily at the substantial town of Lone Pine [Tr. 72].

Appellees' facilities are not remote and isolated to the extent that they are removed from ordinary business competition [Tr. 69].

Appellees' type of facility is becoming less and less frequent as a means of providing food and accommodations for mining employees. On several occasions facilities similar to those of Appellees, and under circumstances similar in material respects to Appellees' Darwin operation, have been curtailed, abandoned or destroyed without affecting either the production of the mine or the availability of employees [Tr. 69-71].

It is frequent that substantial numbers of employees at various mines, in some cases as many as one-half will live at a distance equal to that of the Darwin mine from the town of Lone Pine and commute daily to and from the mine, because of improved highways, better transportation and the desire for community living [Tr. 69-70, 71-72].

Appellees' facilities are not remote and isolated to the extent that they are removed from ordinary business competition [Tr. 69].

On the basis of these and many other facts in the record [Tr. 14-30, 52-74] which are either stipulated or based upon uncontradicted and substantial evidence, we believe that the conclusion that there is a substantial need for these facilities is erroneous, even assuming that to be a test.

C. The Court States the Test of Coverage to Be Whether There Is a "Substantial Need" for Appellees' Facilities a Test Different From that Provided by the Act.

We urge that the determination of substantial need for Appellees' facility is insufficient to meet the requirement of the Act. This was not the test established by Congress. That test requires that the activity of the employees involved must be closely related and directly essential to the production of goods for commerce. Food and lodging of course is a requirement of all employees. This however does not mean that the function of *providing* food and lodging must be closely related and directly essential to the production of goods for commerce.

The Administrator himself states that employees employed in a restaurant "to provide a convenient means of meeting personal needs of his employees" are not within the Act and that such employees are not engaged in work closely related and directly essential to the production of goods for commerce. Similarly, he states that "employees of the producer or of an independent employer who are engaged only in maintaining company facilities for * * * providing food, refreshments, or recreational facilities, including restaurants, cafeterias and snack bars, for the producer's employees in a factory * * * would not be doing work 'directly essential' to the production of goods for commerce." (29 C. F. R., Ch. V, Part 776, §18(b).)

This Court states:

"It is of course essential that employees have adequate food and lodging and if these are not available otherwise, there can be no product unless the employer acts to furnish them. When he does so, employees working in such facility are doing work as 'necessary' or as 'essential' as those who work in the 'factory' proper. (P. 4 of the Decision.)

However, the United States Supreme Court has stated:

“It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.”

McLeod v. Threlkeld, 319 U. S. 491, 497, 87 L. Ed. 1538, 1543-1544.

In that case the employees provided meals for maintenance-of-way employees of a railroad by means of a dining and kitchen car which was set at the place of work of the boarders. Because of the very nature of the work, the employees would have to utilize such facilities since on many if not most occasions no others would be available in the various desolate areas where this type of work had to be done.

We respectfully submit that whether a question affecting commerce or one involving the production of goods for commerce is immaterial to this result, as the Supreme Court in that case indicates where it says:

“In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority. The proposal to have the bill apply to employees ‘engaged in commerce in any industry affecting commerce’ was rejected in favor of the language, now in the act, ‘each of his employees who is engaged in commerce *or in the production of goods*

for commerce' . . . The selection of the smaller group was deliberate and purposeful."

McLeod v. Threlkeld, 319 U. S. 493, 87 L. Ed. 1541.

Judge Yankwich, in discussing the applicability of the *McLeod* case in *Tipton v. Bearl Sprott Co.* (S. D., Cal. 1950), 98 Fed. Supp. 496, discussed below, similarly concluded where he states:

"In *McLeod v. Threlkeld*, 1943, 319 U. S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538, the question did not turn upon the provision which we are considering now. It turned upon the proposition whether *McLeod* was engaged 'in commerce.' Nevertheless, because his occupation related to nutrition,—to feeding,—the case has a significant bearing upon the problem before us."

* * * * *

"The language used . . . is very revealing. . . ."

Tipton v. Bearl Sprott Co., 93 Fed. Supp. 496, 501.

The court in *Kuhn v. Canteen Food Service* (N. D., Ill., 1944), 77 Fed. Supp. 585, similarly states:

". . . the furnishing of the food is as remote from the production of goods for commerce as it is remote from commerce; the furnishing of the food is as remote from the production of goods for commerce as in cases where the employees supply themselves; and in the case of furnishing food to a maintenance-of-way man engaged in commerce, the food would be as necessary for the continuance of his labor, as the continuance of the labor of a man engaged in the production of goods for use in commerce."

Kuhn v. Canteen Food Service, 77 Fed. Supp. 585, 590.

We believe that the history of *McComb v. Factory Stores Co.* (N. D., Ohio, 1948), 81 Fed. Supp. 403, requires a contrary result from that reached here. That case involved a question as to whether the Act covered persons employed by an industrial eating facility similar to that in this case. The facility was located in a plant. Under the contract between the facility and the Republic Steel Corporation, outlined in the decision, the latter kept as much, if not more control over the operation of the facility as is present here. Most of the items relied upon by the Court here were present in that contract. The employees were not permitted to leave the plant and were therefore required to eat at the facility, unless they saw fit to bring their own lunch or utilize a few lunch wagons. Furthermore, even if they could have left the plant "The location of the plant . . . makes it impractical for the men to eat at outside restaurants" and "it would be difficult if not impossible with the available transportation facilities" to do so. (81 Fed. Supp. 403.)

The court in the *Factory Stores* case held that under such circumstances the feeding of employees was necessary to the production of goods for commerce. While this case was pending on appeal before the Sixth Circuit Court of Appeals, it was brought under criticism in Congress and was the subject of much comment. It was in effect repealed by the 1949 amendments. As a result, the case was remanded to the Federal District Court where it was dismissed.

Factory Stores Co. v. McComb (6th Cir., 1949),
179 F. 2d 238.

The criticism and consequent expression of intent by Congress concerning this case as shown in the following

excerpts from the legislative history of the 1949 amendments are most relevant. The House Manager's Statement* on the bill resulting from the Senate-House Conference and later enacted into law by signature of the President on October 26, 1949, states as follows:

"Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F. Supp. 403 (N. D. Ohio, 1948)).

"Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above cited cases. . . ."

* * * * *

"The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:

* * * * *

"All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating or other living facilities for factory workers, are quite clearly not performing any activities that are closely related or directly essential to the production of goods."

95 Cong. Rec. 14928, 14929.

* * * * *

*HR Report No. 1453, 81st Congress, 1st Session, October 17, 1949.

Mr. Lucas in his statement concerning the proposed change in Section 3(j) establishing the coverage test, said:

“Nor could the Administrator hold the act applicable as he has in the past to the following:

“(e) Employees of an independent cafeteria or canteen located in a factory which produces goods for interstate commerce, the cafeteria serving the employees of the factory—*McComb v. Factory Stores Co.* (81 F. Supp. 403).”

95 Cong. Rec. 11216.

The Court’s opinion in the instant case states:

“It is of course essential that employees have adequate food and lodging and if these are not available otherwise, there can be no product unless the employer acts to furnish them. When he does so, employees working in such facility are doing work as ‘necessary’ or as ‘essential’ as those who work in the ‘factory’ proper. * * *” (p. 4.)

We urge that such a finding is directly contrary to the legislative intent as demonstrated by the history of the *Factory Stores* case, since it would require the very result which Congress overruled in its consideration of that case.

Furthermore, the Court finds that the activities of the employees here “was directly essential to the production of ore for commerce, just as in *Womack* the employees in the cook houses were performing a service *necessary* to the production of logs for commerce.” (pp. 4-5, emphasis by the Court.) In doing so it equates “directly essential” with “necessary,” the very result Congress sought to correct. Such a finding we urge does not give effect to the significant changes made by the 1949 amendments.

IV.

A Recent Decision of the Tenth Circuit Court of Appeals, Decided After the Instant Case Was Submitted, Is Persuasive Authority Here and Should Be Considered by the Court.

On July 26 of this year, the Tenth Circuit Court of Appeals, in *Juarez v. Kennecott Copper Corp.* No. 504 (1955), 12 WH Cas. 607, handed down a decision which is direct authority in support of the position of Appellee in this case. In the *Juarez* case the mining company itself owned and operated a hospital located at the rim of an open pit mine in New Mexico. It was contended by plaintiff that the work of the employees of the hospital was so closely related to the production of goods for commerce and so essential thereto as to place them within the coverage of the Act.

In finding that the work of the employees in the hospital was not closely related or directly essential to the production of goods for commerce, the Court stated:

“Apparently no case involving employees of a company owned hospital has come before the courts. The cases nearest in point are those involving restaurant employees and cooks employed in feeding employees engaged in commerce or the production of goods for commerce. Appellants cite a number of cases in which such employees were held to be covered by the Act. Most of these cases arose prior to the amendment of Section 203(j) of the Act in 1949. By that amendment the word ‘necessary’ was dropped from the Act and the words ‘in any closely related process’ were added, making the section read ‘or in any other manner working on such goods or *in any closely related process* or occupation directly essential to the production thereof, in any State.’ We think it

is clear from the legislative history that this amendment was to restrict coverage with respect to such employees. The conference report (H. R. Rep. No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949, W.H.M. 6:607) states, 'The courts have also held the act applicable to employees engaged in maintaining and repairing private homes and dwellings where such homes and dwellings are being leased by interstate producers to their employees. Coverage of the Act has also been extended to employees of an individually owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F. Supp. 403, 8 WH Cases 284 (N. D. Ohio) 1948).'

“‘Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and more direct relationship to the producing, manufacturing, etc., activity than was true in the above-cited cases.’” (Emphasis by the Court.)

Juarez v. Kennecott Copper Corp., 12 WH Cases 607, 609.

We believe that this decision and its consideration of Congressional intent is persuasive and supports the necessity for a rehearing in this case.

For the foregoing reason we respectfully urge that the Court grant this Petition for Rehearing.

GIBSON, DUNN & CRUTCHER,

WILLIAM FRENCH SMITH,

JAMES J. RYAN,

By WILLIAM FRENCH SMITH.

Attorneys for Appellees.

Certificate of Counsel.

The undersigned hereby certifies that he has prepared this Petition for Rehearing and that the grounds there stated are in his opinion well founded and that this Petition is not filed for reasons of delay.

WILLIAM FRENCH SMITH.

APPENDIX.

The House Managers' Statement reporting on the House-Senate Conference bill which contained the 1949 amendments as enacted into law is very relevant in explaining the three requirements of the retail exemption contained in Section 13(a)(2). Pertinent sections are as follows:

"Exemptions

"General statement.—The House bill substantially revised Section 13(a)(2) of the Act relating to retail and service establishments. . . ."

* * * * *

"Retail and service establishments.—Both the House bill and the Senate amendment contained an identical amendment providing for an exemption for retail and service establishments (Sec. 13(a)(2)). The amendment was continued in the conference agreement.

"The amendment (Sec. 13(a)(2)) agreed to in conference clarifies the existing exemption by defining the term 'retail or service establishment' and stating the conditions under which the exemption shall apply. This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts, that no sale of goods or services for business use is retail. See *Roland Electrical Co. v. Walling* (326 U. S. 657); *McComb v. Diebert* (E. D. Pa. 1949), 16 Labor Cases, Par. 64,982; *McComb v. Factory Stores* (81 F. Supp. 403 (N. D. Ohio, 1948)).

"Under paragraph (2) of Section 13(a) as agreed to in conference, an establishment is an exempt retail or service establishment if it meets three tests:

“First, over 50 per cent of the establishment’s sale by annual dollar volume of goods or services must be made within the state in which the establishment is located. The requirement that the greater part of the selling or servicing be in intrastate commerce found in the present law, is eliminated because of the tendency of the courts to hold that many sales of goods or services made or performed within a state are not intrastate sales or services. See *Kirschbaum v. Walling* (316 U. S. 517, 526); *Boutell v. Walling* (32 U. S. 463, 467). Under the new test, if the sales are made within the state in which the establishment is located, it is immaterial that the sales (a) are made pursuant to prior orders from customers, (b) contemplate the purchase of goods by the establishment from outside the state to fill customers’ orders, or (c) *are made to customers who are engaged in interstate commerce or in the production of goods for interstate commerce*. In this connection, see *Wallin v. Jacksonville Paper Co.* (317 U. S. 564).

“The second test provides that in order for an establishment to be exempt, not less than 75 per cent of its annual dollar volume of sales of goods or services (or both) must not be for resale. In other words, at least three-fourths of the goods or services (or both) sold must be to purchasers who do not buy for the purpose of reselling. Normally, goods are to be considered as sold for resale even though the purchaser sells them in an altered form. . . .”

“The third test provides that 75 per cent of the establishment’s annual dollar volume of sales of goods or services (or of both) must be recognized in the particular industry as retail sales or services. *Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and courts as a retail sale or service, so long*

as such sale or service is recognized in the particular industry as a retail sale or service.

“The location of the establishment, whether in an industrial plant, an office building, railroad depot, or a Government park, etc., will make no difference in the application of the exemption. So long as the establishment meets the tests described above, it will be excluded from the minimum wage and overtime provisions of the Act.”

House Managers' Statement (House of Representatives Report No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949; 95 Cong. Rec. 14931-14932, Oct. 18, 1949).



IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
APPELLANT

v.

HAROLD S. ANDERSON, JR., ET AL.,
APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

SUPPLEMENTAL BRIEF FOR APPELLANT

STUART ROTHEMAN,
Solicitor,
BESSIE MARGULIN,
Assistant Solicitor,
WILLIAM W. WATSON,
Attorney,
United States Department of Labor,
Washington 25, D. C.

KENNETH C. ROBERTSON,
Regional Attorney.

FILED

JAN 16 1955

I. The legislative reports on the 1949 Amendments to the Act show conclusively that the decision of this Court in <u>Womack</u> , and the decisions in the <u>Hanson</u> and <u>Kirschbaum</u> cases which govern the question of coverage here, are still controlling and authoritative - - - -	2
II. The Sections 13(a)(1) and 13(a)(2) exemptions are clearly inapplicable since the messhall and lodging facilities are operated as integral parts of Anaconda's production operations - - - - -	24
A. The messhall and lodging facilities at the mine do not constitute a "retail or service" establishment within the meaning of Section 13(a)(2) - - - - -	24
B. Appellees' employees engaged in the operation of the messhall and lodging facilities for employees at the Anaconda mine are not employed in a "local retailing capacity" within the meaning of Section 13(a)(1) - - - -	31
III. The case should not be remanded since the conclusions expressed in the majority opinion are essentially legal conclusions - - - - -	33
Conclusion - - - - -	39

CITATIONS

Cases:	
<u>Alstate Construction Co. v. Durkin</u> , 345 U.S. 13 - - - -	18, 24
<u>Armour & Co. v. Wantock</u> , 323 U.S. 126 - - - - -	8, 11, 23
<u>Baumgartner v. United States</u> , 322 U.S. 665 - - - - -	38
<u>Bay Ridge Co. v. Aaron</u> , 334 U.S. 446 - - - - -	36
<u>Bracey v. Luray</u> , 138 F.2d 8, certiorari denied, 332 U.S. 790 -	36
<u>Broach v. McPherson</u> , 220 Ark. 457, 248 S.W.2d 355, reaffirmed 257 S.W.2d 565 - - - - -	20

1. The first of these is the fact that the
the first of these is the fact that the

the first of these is the fact that the
the first of these is the fact that the

the first of these is the fact that the
the first of these is the fact that the

the first of these is the fact that the
the first of these is the fact that the

the first of these is the fact that the
the first of these is the fact that the

the first of these is the fact that the
the first of these is the fact that the

the first of these is the fact that the
the first of these is the fact that the

the first of these is the fact that the
the first of these is the fact that the

the first of these is the fact that the
the first of these is the fact that the

the first of these is the fact that the
the first of these is the fact that the

Clyde v. Broderick, 144 F.2d 349 - - - - - 34
Consolidated Timber Co. v. Momack, 132 F.2d 101 - - - 2, 6, 7, 9,
 16, 25, 28, 35
Durkin v. Joyce Agency, 110 F.Supp. 918 - - - - - 17, 21
E. I. Du Pont de Nemours & Co. v. Harrup, 12 WH Cases 693 - - 21
Equitable Life Assur. Soc. v. Ireland, 123 F.2d 462 - - - - 38
General Electric Co. v. Porter, 208 F.2d 805 - - - - - 18, 37
Hanson v. Lagerstrom, 133 F.2d 120 - - 2, 7, 9, 16, 25, 28
Hawkins v. E. I. Du Pont de Nemours & Co., 192 F.2d 294 - - 21, 22
Hulahan v. United States, 214 F.2d 441, certiorari
 denied, 348 U.S. 856 - - - - - 34
Juarez v. Kennecott Copper Corporation, 225 F.2d 100 - - - - 22
Kantor v. Garchell, 150 F.2d 47 - - - - - 34
Kirschbaum Co. v. Walling, 316 U.S. 517 - - - 2, 8, 9, 10, 17
Knapp v. Imperial Oil & Gas Products Co., 130 F.2d 1 - - - - 38
Kuhn v. Princess Lida of Thurn & Taxis, 119 F.2d 704 - - - - 38
Maneja v. Waialua Agricultural Company, 349 U.S. 254 - - - - 22
Messenger v. Traders Compress Co., 107 F.Supp. 354, reversed
 on other grounds, 199 F.2d 8, certiorari denied 344 U.S. 909 - 20
McLeod v. Threlkeld, 319 U.S. 491 - - - - - 23
McComb v. Roig, 181 F.2d 726 - - - - - 36
McComb v. Sterling Ice & Cold Storage Co., 165 F.2d 265 - - - 36
McComb v. Wyandotte Furniture, 169 F.2d 766 - - - - - 36
Mitchell v. Brown, 224 F.2d 359, certiorari denied,
 350 U.S. 875 - - - - - 36
Mitchell v. Chambers Construction Company, 214 F.2d 515 - - - 36
Mitchell v. Denton, 224 F.2d 596 - - - - - 34

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

Mitchell v. Famous Realty, Inc., 211 F.2d 198,
certiorari denied, 348 U.S. 823 - - - - - 19, 20, 35

Mitchell v. Joyce Agency, 348 U.S. 945 - - - - - 17, 20, 21, 24

Mitchell v. Mercer Water Co., 208 F.2d 900, affirming per
curiam Durkin v. Mercer Water Co., 112 F.Supp. 656 - - - - - 20

Mitchell v. Pascal System, 226 F.2d 391 - - - - - 20, 33, 35

Mitchell v. C. W. Voilmer & Co., 349 U.S. 427 - - - - - 17, 24, 35

Nick v. United States, 122 F.2d 660, certiorari denied,
314 U.S. 687, rehearing denied, 314 U.S. 715, rehearing
denied, 316 U.S. 710 - - - - - 34

Orvis v. Higrins, 180 F.2d 537, certiorari denied,
340 U.S. 810 - - - - - 38

Pacific Portland Cement Co. v. Food Machinery & Chemical
Corp., 178 F.2d 541 - - - - - 38

Phillips Co. v. Walling, 324 U.S. 490 - - - - - 32

Roland Co. v. Walling, 362 U.S. 657 - - - - - 35

Russell Co. v. McComb, 187 F.2d 524 - - - - - 19

Rutherford Food Corp. v. McComb, 331 U.S. 722 - - - - - 36

Schulte Co. v. Gangi, 328 U.S. 108 - - - - - 24

Slover v. Wathen, 140 F.2d 258 - - - - - 36

Smith v. Royal Ins. Co., 125 F.2d 222, certiorari denied,
316 U.S. 695 - - - - - 38

Stuart Oxygen Co. v. Josephian, 162 F.2d 857 - - - - - 38

Sun Insurance Office, Ltd. v. Be-Mac Transport Co.,
132 F.2d 535 - - - - - 38

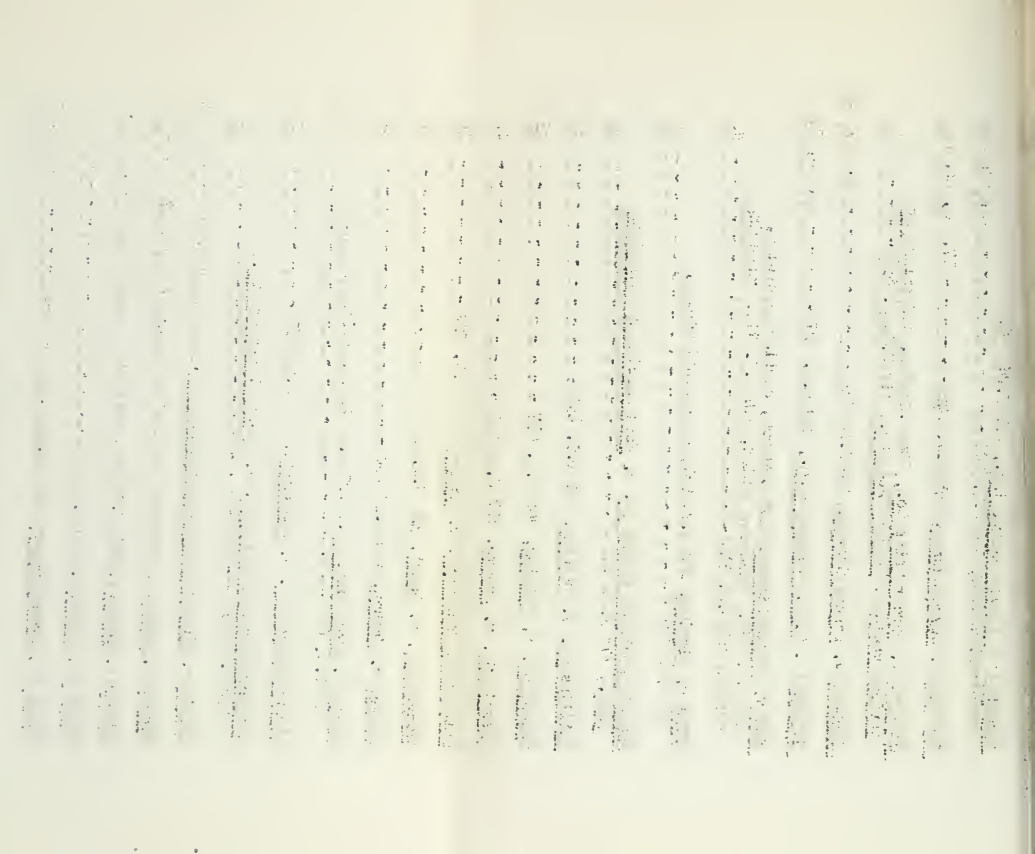
Tobin v. Cherry River Boom & Lumber Co., 102 F.Supp. 763 - - - - - 20, 22

Tobin v. Hayes, 11 WH Cases 140, 22 Labor Cases, Par. 67208 - - - - - 20

Tobin v. Johnson, 196 F.2d 130, certiorari denied, 345 U.S. 915 - - - - - 18

Tobin v. La Duke, 190 F.2d 677 - - - - - 37

Tobin v. Promersberger, 104 F.Supp. 314 - - - - - 20, 21



<u>United States v. Silk</u> , 331 U.S. 704	- - - - -	37
<u>United States v. United States Gypsum Co.</u> , 333 U.S. 364	- - - - -	38
<u>Walling v. Friend</u> , 156 F.2d 429	- - - - -	36
<u>Walling v. Goldblatt Bros.</u> , 128 F.2d 778, certiorari denied, 318 U.S. 757	- - - - -	36
<u>Walling v. Helmerich & Payne</u> , 323 U.S. 37	- - - - -	36
<u>Walling v. Uhlmann Grain Co.</u> , 151 F.2d 381	- - - - -	36
<u>Walling v. Youngerman-Reynolds Hardwood Co.</u> , 325 U.S. 419, rehearing denied, 326 U.S. 804	- - - - -	36

Federal Statutes:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of Oct. 26, 1949, c. 736, 63 Stat. 910:	
Section 3(j)	- - - - - 9, 11, 12, 17, 22
Section 7(a)	- - - - - 36
Section 13(a)(1)	- - - - - 31
Section 13(a)(2)	- - - - - 24, 28

Miscellaneous:

29 CFR, 1955 Supp., 541.4	- - - - - 31, 32
95 Cong. Rec. 12,505	- - - - - 29
95 Cong. Rec. 14,874	- - - - - 9, 10, 12, 13, 16, 17
95 Cong. Rec. 14,875	- - - - - 12, 17
95 Cong. Rec. 14,877	- - - - - 29
95 Cong. Rec. 14,928	- - - - - 12, 13, 15
95 Cong. Rec. 14,929	- - - - - 16
95 Cong. Rec. 14,936	- - - - - 9
95 Cong. Rec. 14,942	- - - - - 9, 30

1. The first part of the report deals with the general situation of the country and the progress of the work during the year. It is divided into two main sections: the first section deals with the general situation of the country and the progress of the work during the year, and the second section deals with the results of the work during the year.

2. The second part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work during the year, and the second section deals with the results of the work during the year.

3. The third part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work during the year, and the second section deals with the results of the work during the year.

4. The fourth part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work during the year, and the second section deals with the results of the work during the year.

5. The fifth part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work during the year, and the second section deals with the results of the work during the year.

6. The sixth part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work during the year, and the second section deals with the results of the work during the year.

7. The seventh part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work during the year, and the second section deals with the results of the work during the year.

8. The eighth part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work during the year, and the second section deals with the results of the work during the year.

9. The ninth part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work during the year, and the second section deals with the results of the work during the year.

10. The tenth part of the report deals with the results of the work during the year. It is divided into two main sections: the first section deals with the results of the work during the year, and the second section deals with the results of the work during the year.

NO. 14327

JAMES P. MITCHELL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
APPELLANT

v.

HAROLD S. ANTERSON, JR., ET AL.,
APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

SUPPLEMENTAL BRIEF FOR APPELLANT

This brief is filed pursuant to this Court's order, dated December 11 and filed December 14, 1955, inviting the parties to supplement their briefs, now on file, covering questions as to (1) the effect of the 1949 amendments to Section 3(j) of the Fair Labor Standards Act and on the principle of coverage announced by this Court in Consolidated Timber Co. v. Womack, 132 F.2d 101; (2) the proper construction of the statute defining retail establishment; (3) whether the case should be remanded to the district court for findings as suggested by Judge Fee in his dissenting opinion.

1

100

[illegible][illegible]

Further study and analysis of these three questions strengthens the conclusion that the majority opinion is correct in all respects and should be affirmed.

I

THE LEGISLATIVE REPORTS ON THE 1949 AMENDMENTS TO THE ACT SHOW CONCLUSIVELY THAT THE DECISION OF THIS COURT IN WOMACK, AND THE DECISIONS IN THE HANSON AND KIRSCHBAUM CASES WHICH GOVERN THE QUESTION OF COVERAGE HERE, ARE STILL CONTROLLING AND AUTHORITATIVE

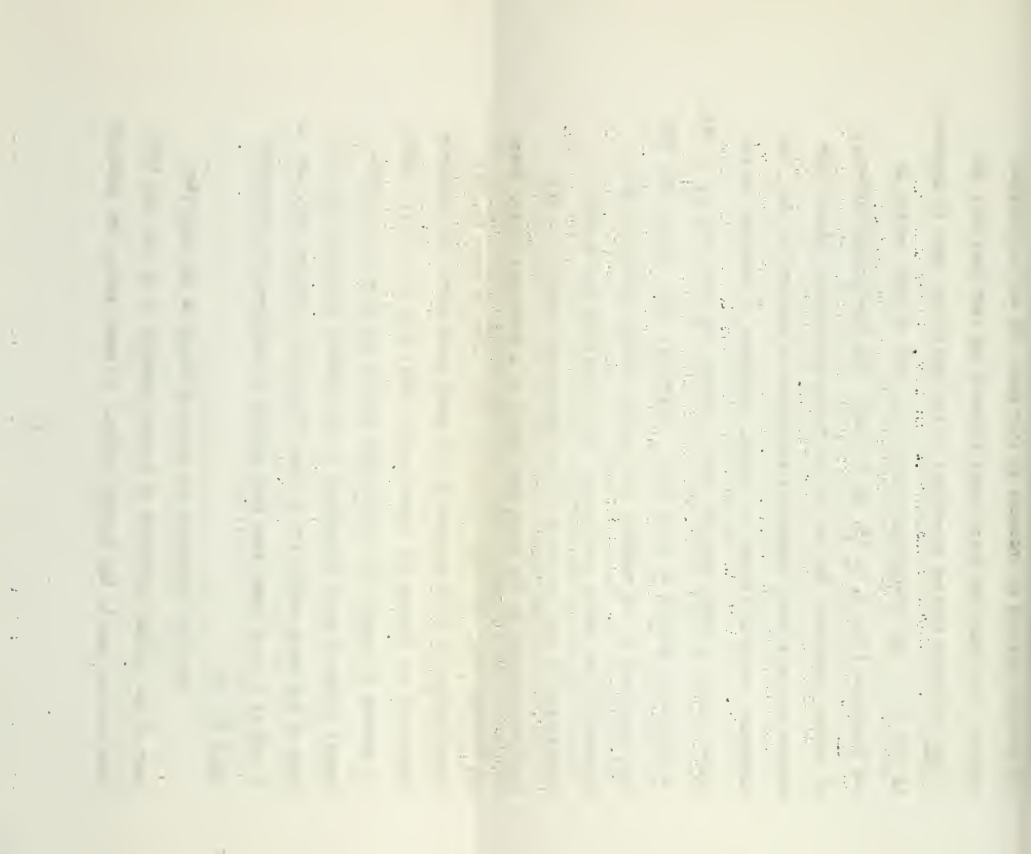
The basis of this Court's majority opinion in the instant case is that it falls squarely within the principles of coverage pronounced in this Court's decision in Womack and in the Hanson and Kirschbaum cases. The conclusion of the trial court that the Anaconda mine is not so remote and isolated as will bring its messhall and lodging facilities within the coverage of the Act is in direct conflict with the Womack decision. The Womack case, as we will show, is indistinguishable from the instant case in actual fact and basic principle. This is revealed by undisputed facts, which were largely stipulated, as follows:

There are no eating and lodging facilities at the Anaconda mine other than those operated by appellees who hold an exclusive franchise to conduct subsistence operations (Plf. Exh. B, R. 41). While the Anaconda Company also owns some houses and trailers which it rents to employees, these are largely occupied by its mill workers who are usually family men and whose employment, unlike that of the underground miners, is of a more stable nature (R. 140). Of the some

236 persons employed by Anaconda at this mine, 126 are underground workers. And while the trial court stressed the fact that only 20% of all employees availed themselves of the facilities, what is important is that 62 of the underground workers, i.e. 50% of them, reside in the bunkhouse (Fdg. 3, R. 55, 56, R. 140). The underground workers, of course, constitute the nub of the mining operations. Since these workers are as a rule, transients and migratory workers (R. 140), the bunkhouse, which is limited to the male employees of Anaconda who are either single or whose families reside outside the area (Fdg. 5, R. 58), is peculiarly adapted to their needs. Apparent, also, is the fact that the operations of the messhall are equally closely integrated and adjusted to the mining operations. Thus, mealtimes are adjusted principally to meet the needs of the underground workers (R. 57).

Employees working in the mine, who cannot as a practical matter leave the working area, eat their lunches at their place of work (R. 64). Approximately 20 to 25 percent of the total meals served by appellees consist of box lunches for these workers (Plf. Exh. C, R. 49). About 49 workers (primarily the underground workers who live in the bunkhouse) regularly avail themselves of the messhall facilities (R. 18). Most of the meals served are to these "Boardroll" workers (Plf. Exh. C, R. 49) at a price lower than that charged to employees for occasional meals (R. 64).

That the facilities are operated simply as an integrated part of the mining operations is further attested to by the fact that they are not open to the general public. As noted above, the bunkhouse



agreement" under which appellees operate the facilities expressly prohibits the use of the premises for any purpose other than that specified in the agreement (R. 41). There are no signs indicating that the messhall is an eating establishment (R. 85) and appellees do no highway advertising of their facilities (Fdg. 5, R. 57). Indeed, a sign on one of the access roads warns, "children and unauthorized persons" to "keep out" (Plf. Exh. 1, R. 86). The only advertising of the facilities is Anaconda's help-wanted advertisement in which it makes a point of noting that "good bunkhouse accommodations" are available (Plf. Exh. AA, R. 51), which admittedly are an inducement in securing employees (R. 128, 129). To a very limited extent and only incidentally does the messhall serve outsiders (Fdg. 1, R. 53). These consist of occasional visitors for which a flat price per meal is charged (R. 42). Guests of the mine management are occasionally accommodated at the messhall, and Anaconda compensates appellees therefor (R. 19).

As the majority opinion noted, the Anaconda mine is located about a mile from the town of Darwin, less than 150 population, which lies in the Mojave desert (Opinion, p. 1). The undisputed facts show that there are no living facilities in the vicinity which could possibly meet the needs of the miners. Darwin has no privately operated rooming houses. The town has a small cafe which is little more than a lunch counter for short orders, containing 7 or 8 stools, and which obviously can accommodate only a handful of persons at a

on week days before 12:00 noon, and is closed one weekday altogether (R. 21). Its operations are now limited to serving ham sandwiches and chili when the refreshment bar is open (R. 147). Crosson's, the only other "restaurant" in the town of Darwin, sells only hamburgers, chili and beans, ham sandwiches and similar items as well as beer and soft drinks (n. 59, 60). Its accommodations are even more meager than those of the Darwin Cafe (Exhs. J and K).

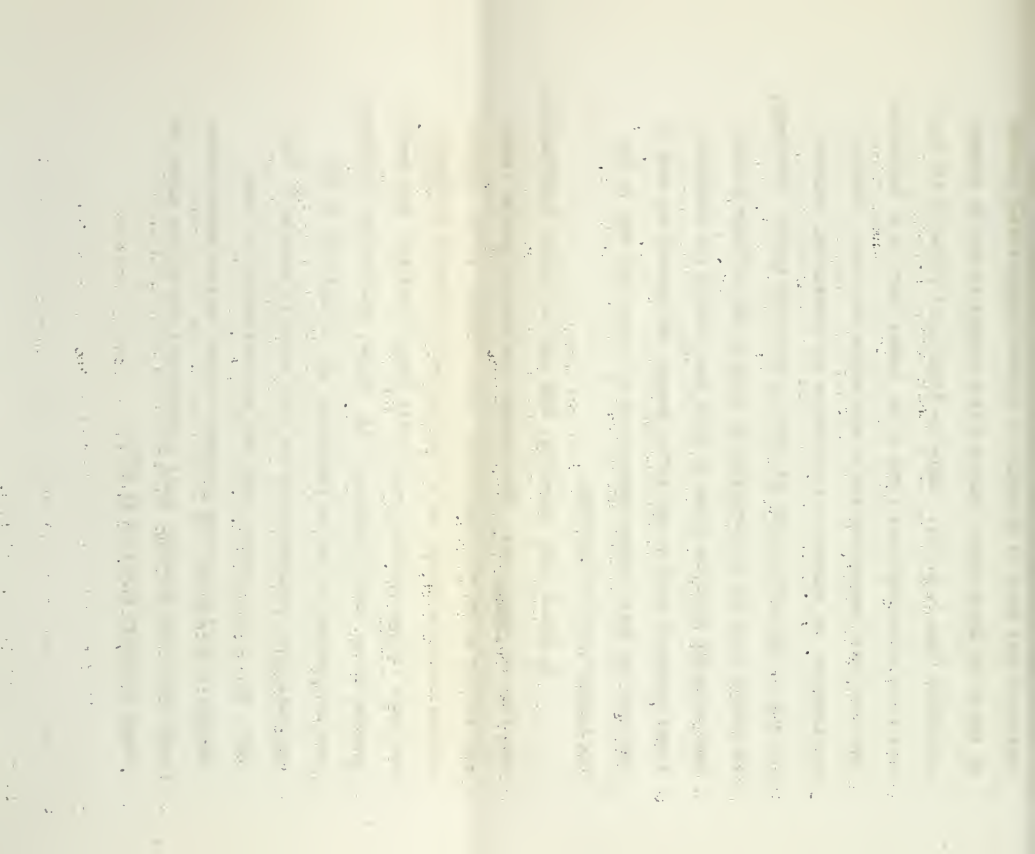
The nearest other eating facilities are located in the towns of Keeler (R. 62), population 150, Panamint Springs (n. 62), population 10 to 12, Olancho (R. 61), population 200, and Lone Pine (R. 62, 63), located at distances of 23, 23, 34 and 38 miles away respectively. As noted by the majority, there are only meager accommodations at each of these places (Opinion, p. 2). The Desert Club, the only eating establishment in Keeler serves short orders and meals upon a very limited basis (R. 23). Panamint Springs has a restaurant and motel which can accommodate only 30 persons, and obviously these are tourist accommodations unsuitable for the needs of the miners. The per day rate at the motel is \$4.00 single and \$5.50 double. Prices for meals are: Breakfast \$1.75, lunch \$1.00, and dinner \$2.00 (R. 24). The town of Olancho, 34 miles distant, contains restaurants and motels, but the living facilities are plainly not the type suitable for the mining employees (R. 22, 23). The nearest town which could possibly approximate the needs of the Anaconda employees is Lone Pine, some 38 miles from the mine (R. 62, 63).

...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...

...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...
...the ... of the ... and ... of the ...

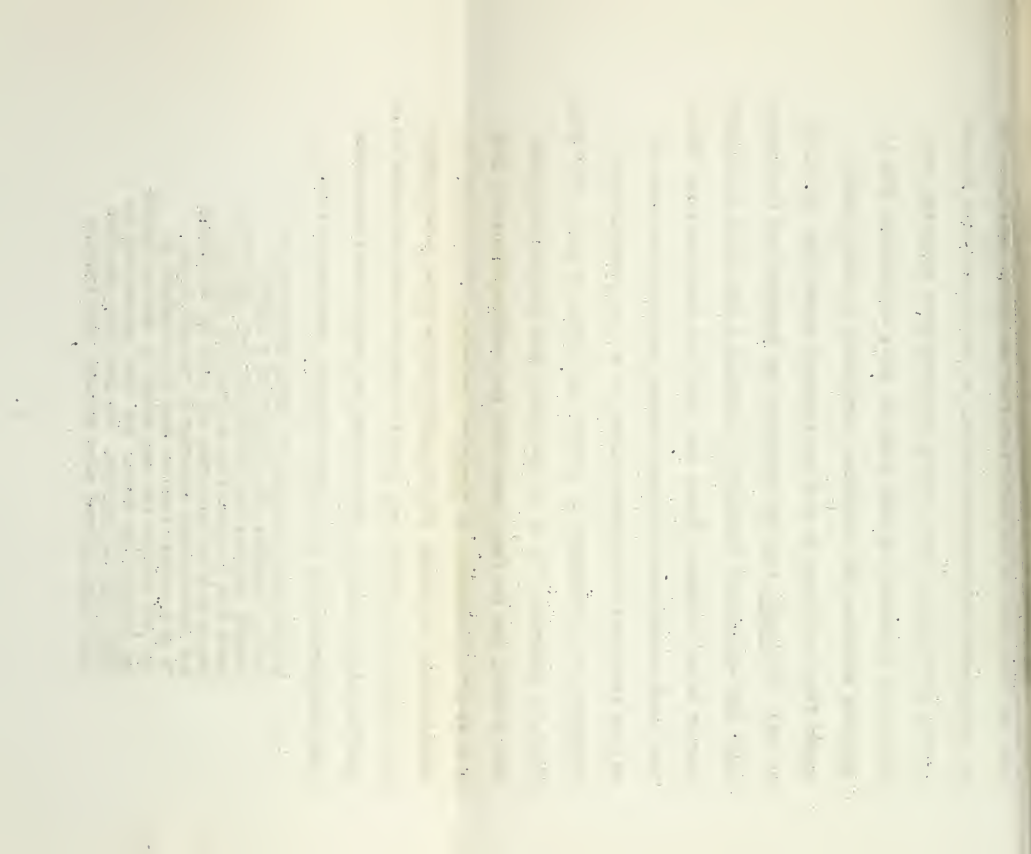
considered that there is no public or carrier transportation service to any of the above towns. They are thus accessible only by private automobile (Fdg. 6, R. 58). While the trial court relied on the fact that a few mining employees lived in the towns, there is no indication just what their occupations are or what shifts they work. Plainly, the towns are not adapted to take care of any substantial number of the miners, and particularly not those on the early shifts. Obviously, the miners could not get breakfast or lunch at any of these places. They certainly could not drive 23 miles each morning for breakfast, a most important meal, we may safely assume, for miners, and many of them must eat their lunches underground for which they rely on the box lunches served by Anderson.

In actual fact, therefore, this case is plainly indistinguishable from the Womack case. The Anaconda mine here is just as remote and isolated as was the logging camp there. Indeed, as the majority opinion correctly notes, one of the cook houses involved in Womack was "in a village providing more public eating facilities than Darwin provided in our case" (Opinion, p. 4). There, also as here, employees were not required to use the facilities, and in fact many of the employees lived in Glenwood and ate their meals at home, as in this case. This Court, however, held that the availability of other limited facilities was "not persuasive" since "no such establishment could supply the necessary meals required by [such a large number of] hungry laborers" (132 F.2d at 107).



case was predicated on the assumption that the living facilities must be indispensable under possible as well as actual conditions in order for the Act to apply. After citing instances where employees have lived 30 or 40 miles from their place of work, it theorized that if appellees abandoned the facilities, restaurants in Darwin would expand their facilities to meet the increased demand (Fdg. 20, R. 69; R. 164). In Womack, too, the contention was advanced that the Company might have avoided the necessity of providing a cook house by employing loggers in the vicinity. There, too, the trial court had found "While this lunch counter could not under present conditions take care of all the trade were the cookhouse closed, * * * the possibility of expansion is a circumstance of weight" (43 F.Supp. at 631). Said this Court, in reversing, "it is not what could have been the fact, but what actually was the fact, upon which the decision must rest" (132 F.2d at 107). Similarly, in Hanson v. Laperstrom, 133 F.2d 120, the Eighth Circuit in holding the Act applicable to a cook house employee at a logging camp located only 13 miles from the towns of Little Falls and Big Falls, Minnesota, whose eating and lodging facilities might have been adequate for the needs of loggers, noted (at p. 122):

The proximity of hotels at Little Falls and Big Falls, Minnesota, the presence of a highway running past the camp within 150 feet, and other roads kept open the year around, with many men owning cars of their own, are cited as indicating the non-essential character of the cook house. It is also said that the cost of production is the same whether the camp method is used or farmers and shackers are hired. But these suggestions are aside from the question. The fact that defendant might have employed other methods, thus avoiding



was necessary to maintaining a cook house, is not important. "We are here concerned with a combination and not a theory." We must confine our consideration to what was actually done and not to what might have been done.

Thus, the theorizing by appellees' expert as to what might be done in mining camps is immaterial (R. 114-126). Indeed this testimony boils down to little more than that living facilities are furnished as long as they are essential, and that they are abandoned only when they become non-essential. It follows that as long as facilities are actually furnished, it may be safely assumed that they are essential to the maintenance of a mine's production. As the Supreme Court so aptly noted in Armour & Co. v. Wantock, 323 U.S. 126 at 130: "A court would not readily assume that a corporation's management was spending stockholders' money on a mere hobby or extravagance."

The basis for holding coverage of the cookhouse employees in both the Womack and Hanson cases was that such employment plainly falls within the criteria established by the Supreme Court in Kirschbaum Co. v. Walling, 316 U.S. 517. In that case, the Act was held applicable to maintenance workers employed by the owner of a loft building tenanted by manufacturers producing goods for commerce. The Supreme Court stated, in language which is quoted in both Womack and in the majority opinion in the instant case:

* * * In our judgment, the work of the employees in these cases had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce." (316 U.S. 525-526, emphasis added).

[illegible]

trolling and authoritative was made clear beyond doubt in the legislative reports on the 1949 amendments to the Act. And court decisions since the amendments recognize and confirm their continued authoritative effect. The legislative history of the amended Section 3(j) plainly shows that the change was not designed to cause any severe restriction of the scope of the Act as previously construed by the courts, but, rather to provide a more specific guide than does the word "necessary" to prevent extension of the Act "to employees of an enterprise purely local in nature who may incidentally perform some work having a remote or tenuous relationship to the operations of a producer of goods for interstate commerce." (Statement of the Majority of the Senate Conferees, 95 Cong. Rec. 14,874, October 18, 1949). As stated by Representative Lesinski, Chairman of the House Committee, "the amended section gives the courts a more specific guide as to the intention of Congress; it does not, however, radically revise the coverage of the act as it has been interpreted by the courts in the past." (95 Cong. Rec. 14,942, October 18, 1949).

Specifically, the change in the definition of "produced" was not intended to exclude from the Act employees of the type here involved and in the Womack and Hanson cases. This is made clear, (1) by rejection of the word "indispensable" as being too restrictive, 1/ (2) by express

1/ 95 Cong. Rec. 14,874, October 18, 1949. See also 95 Cong. Rec. 14,936, October 18, 1949.

1870

...

...

...

...

...

of the Senate Conferees, (3) by the choice of language virtually identical to the Supreme Court's language in Kirschbaum, and (4) by statements in both branches of Congress expressly approving the Kirschbaum case.

The Report of the Majority of the Senate Conferees makes it clear that employees of the type here involved were not intended to be removed from the protection of the Act. It states:

What is necessary to production has been the subject of litigation in many hundreds of cases in the courts, and varying interpretations of the meaning of the term as applied in particular fact situations may be found in the decisions. The language of the conference agreement should provide more certainty in this field. It adopts the standard of closely related which the Supreme Court has supplied in most of its decisions interpreting coverage. This language is descriptive of activities which, although not an integral part of the productive operations, have a relationship to production which may reasonably be considered close as distinguished from remote and tenuous. Its reference to activities directly essential to production does not, as did the House Bill, require that the activities be indispensable to production. Rather, the conference agreement contemplates activities which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of operations which are part of an integrated effort for the production of goods. Such directly essential activities are to be distinguished from those which are only indirectly essential to production, such as the procurement of land for a new factory or the manufacture of brick for its buildings [95 Cong. Rec. 14,874, October 16, 1949, emphasis added].

After pointing out that coverage of a real estate firm's employees could not be predicated on the rental of living quarters to factory

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

* * * Of course, this does not mean that the language of the conference agreement withdraws from coverage employees engaged in operating or maintaining living facilities for employees of a producer of goods for interstate commerce, in situations where living facilities such as food and lodging are provided as a means of assuring continued and efficient production and the furnishing of such facilities is therefore closely related and directly essential to production, as in Consolidated Timber v. Womack, 132 F.2d 101 (C.A. 9); Hanson v. Lacerstrom, 133 F.2d 180 (C.A. 8); Basik v. General Motors Corp. (Mich. Sup. Ct.), 19 N.W.2d 112. Ibid.

The majority opinion has thus correctly interpreted the intent of Congress in amending Section 3(j) as expressed in this Report. In effect the opinion holds that the living facilities need not be indispensable to productive operations at the mine in order for the employees operating them to be covered. Viewing the evidence in a practical manner it recognized that it permits of no other conclusion but that the facilities are provided as an "integrated part of the Anaconda enterprise" which are "essential to its business" (Opinion, p. 6).

The Supreme Court has specifically approved of this approach in interpreting the tests of coverage set forth in this Act. Thus, in Armour Co. v. Wantock, 323 U.S. 126, it stated: "A holding that a process or occupation described as "indispensable" or "vital" is one "necessary" within the Act [as in Kirschbaum] cannot be read as an authority that all which cannot be so described are out of it" (323 U.S. at 131).

"Whatever terminology is used, the criterion is necessarily one of degree and must be so defined." Kirschbaum Co. v. Walling, 316 U.S. 517, 526. In their context, the restrictive words like "indispensable,"

[The page contains extremely faint, illegible text, likely bleed-through from the reverse side.]

which petitioner quotes, do not have the automatic significance petitioner seeks to give them. What is required is a practical judgment as to whether the particular employer actually operates the work as part of an integrated effort for the production of goods" (323 U.S. at 130).

While the Armour case was decided prior to the 1949 amendments, the logic of the views there expressed by the Court is no less applicable to the amended language of Section 3(j). For in amending that Section, Congress expressly rejected the test of "indispensability," and specifically noted that the activities contemplated as coming within the amended language were those "which directly aid production in a practical sense by providing something essential to the carrying on in an effective, efficient, and satisfactory manner of operations which are part of an integrated effort for the production of goods." (95 Cong. Rec. 14874, October 18, 1949, emphasis added). Moreover, ~~express~~ approval was given to the Armour decision in the Report of the Majority of the Senate Conferees (95 Cong. Rec. 14875).

Appellees, in an attempt to avoid the impact of the language of the Report which gives express approval to the Womack and Hanson decisions by citing them, quotes from the House Conference Report (Petition for Rehearing, p. 22). This Report does not mention the Womack and Hanson cases, but states:

* * * Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F.Supp. 403 (N.D. Ohio, 1948)). Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

CHICAGO, ILLINOIS

1913

TO THE HONORABLE

THE PRESIDENT OF THE UNIVERSITY

OF CHICAGO

AND THE FACULTY

OF THE UNIVERSITY

OF CHICAGO

IN RESPONSE TO A RESOLUTION

PASSED BY THE FACULTY

AT ITS MEETING OF

APRIL 10, 1913

AND TO THE HONORABLE

THE BOARD OF TRUSTEES

OF THE UNIVERSITY

OF CHICAGO

IN RESPONSE TO A RESOLUTION

PASSED BY THE BOARD

OF TRUSTEES

AT ITS MEETING OF

APRIL 10, 1913

AND TO THE HONORABLE

THE FACULTY

OF THE UNIVERSITY

OF CHICAGO

IN RESPONSE TO A RESOLUTION

PASSED BY THE FACULTY

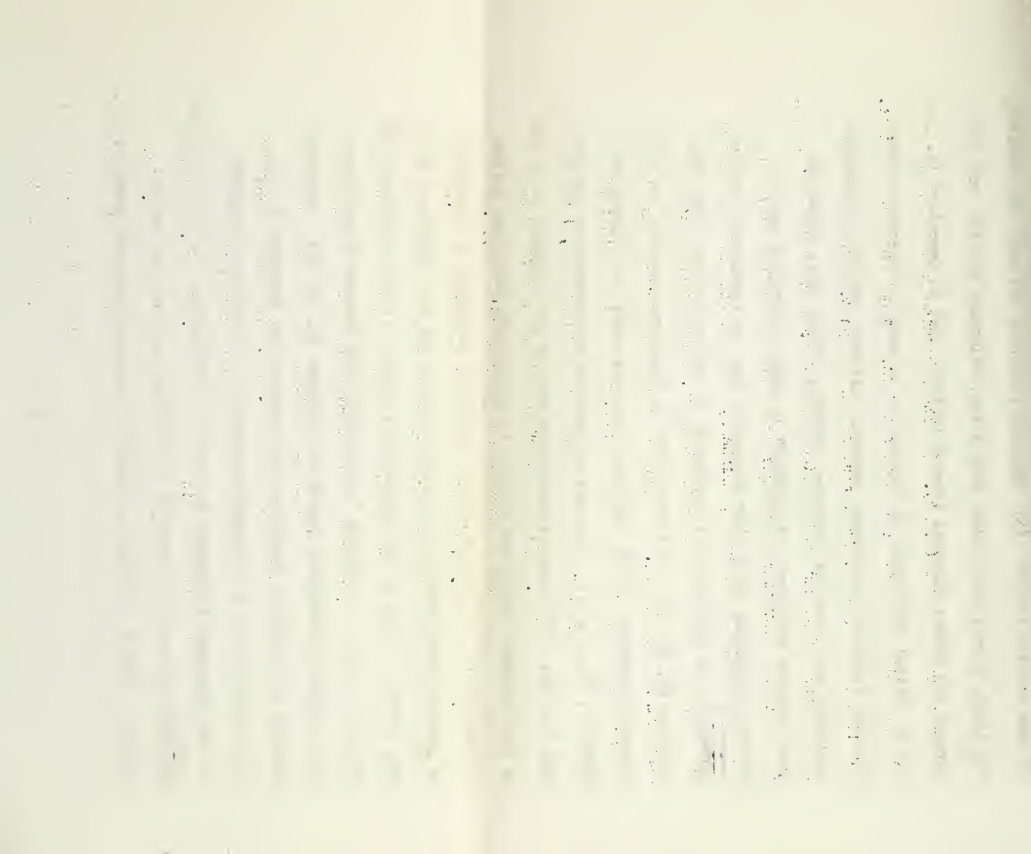
A close comparison of the language of these two reports, and an appreciation of the Congressional intent to provide a clearer guide for judicial determination, plainly reveal the line of distinction to be drawn in this area of industrial feeding. The House Report was concerned with the typical situation where a restaurant is located in a factory, which is substantially indistinguishable from any neighboring restaurant to which factory workers would have access. The Senate Report, on the other hand, specifically contemplated the situation presented here to this Court, "where living facilities such as food and lodging are provided as a means of assuring continued and efficient production" (95 Cong. Rec. 14874, October 18, 1949).

Prior to 1945 the living facilities here were operated by the Anaconda Company itself (Rdg. 2, R. 54). Appellees now operate them under a "subsistence agreement" with Anaconda which significantly refers to them throughout as the "Operator" (R. 32, 38). At least 10 items in this agreement demonstrate that the facilities are not operated as an independent enterprise but, rather, solely for the benefit of Anaconda's mining operations. Thus, (1) The bunkhouse and messhall, which are owned by Anaconda, are "leased" to the "Operator" for "conducting subsistence operations." This so-called "lease" not only provides for no payment of rent, but specifically states that the consideration for the lease shall be the services rendered by the "Operator" (R. 35, 41). Housing is furnished by Anaconda without cost to all of

[illegible]

30 days written notice. (3) Anaconda furnishes not only the premises, but light, power, heat, fuel, gas, steam, telephone service, and even garbage and refuse disposal service "without cost to Operator" (R. 33).

(4) No initial investment is required to be made by "Operator" since Anaconda furnishes bunkhouse, messhall, kitchen, and office equipment including such items as blankets, bedding, refuse cans, china and other similar equipment. "Operator" is under obligation only to replace expendable items when necessary, and, on termination of the agreement, to turn back all equipment, or its equivalent, less wear and tear (R. 34, 40). (5) "Operator" is reimbursed monthly for all operating expenses and is guaranteed a gross profit of \$750.00 per month (R. 44, 46, 47). The cost to Anaconda has averaged \$.30 per meal (R. 64). (6) Detailed accounting records are required to be kept by the "Operator" which are subject to inspection, audit and review by Anaconda (R. 44), and a monthly operating statement is furnished to Anaconda along with an invoice for monies due the "Operator" to be paid within 15 days of its submission (R. 44). (7) The "Operator" is required to use the premises "exclusively" for Anaconda's employees and occasional authorized guests and visitors (R. 35, 36). Anaconda reserves the right of inspection and entry on the premises (R. 41). The messhall is to be operated principally for bunkhouse occupants and the agreement stipulates the prices to be charged (R. 42). Employees pay \$2.60 per day on a straight board basis and \$.60 per day for lodging. This is collected by means of a payroll deduction plan (R. 42).



"Operator" is prohibited from assigning the agreement, subletting the premises, or granting any concessions without the prior written consent of Anaconda. (9) "Operator" agrees to furnish wholesome daily meals "as directed by the Company," the quality, quantity, and variety of which "shall be such as meets the Company's approval." (10) "Operator" is to secure insurance in the amount and form as the Company shall approve with Anaconda named as an additional insured party (R. 45).

The degree of control retained by Anaconda over the operation of the facilities is reflected in the fact that employee grievances or dissatisfaction as to the food served or prices charged are taken up directly with Anaconda, even as to such details as to whether the bacon is sufficiently well done (R. 98, 99).

As the majority opinion recognizes, "Realistically, appellees are managing the facility for Anaconda, and as a facility directly essential for Anaconda's enterprise" (Opinion, p. 7). Clearly, this is not the "independently owned and operated restaurant located in a factory" referred to in the House Conference Report as no longer being covered under the Act (95 Cong. Rec. 14928, October 18, 1949). The facts in the Factory Stores case cited in that Report (81 F.Supp. 403), in striking contrast to those in the instant case, show the independence of operation of the cafeteria plant facilities there which were located in the City of Cleveland, Ohio. There the arrangement called for the normal risks of an entrepreneur with payment of rental and no guarantee of profits. Indeed, Factory Stores was permitted to close certain of its units because of unprofitable operating conditions. The building

1870

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

...

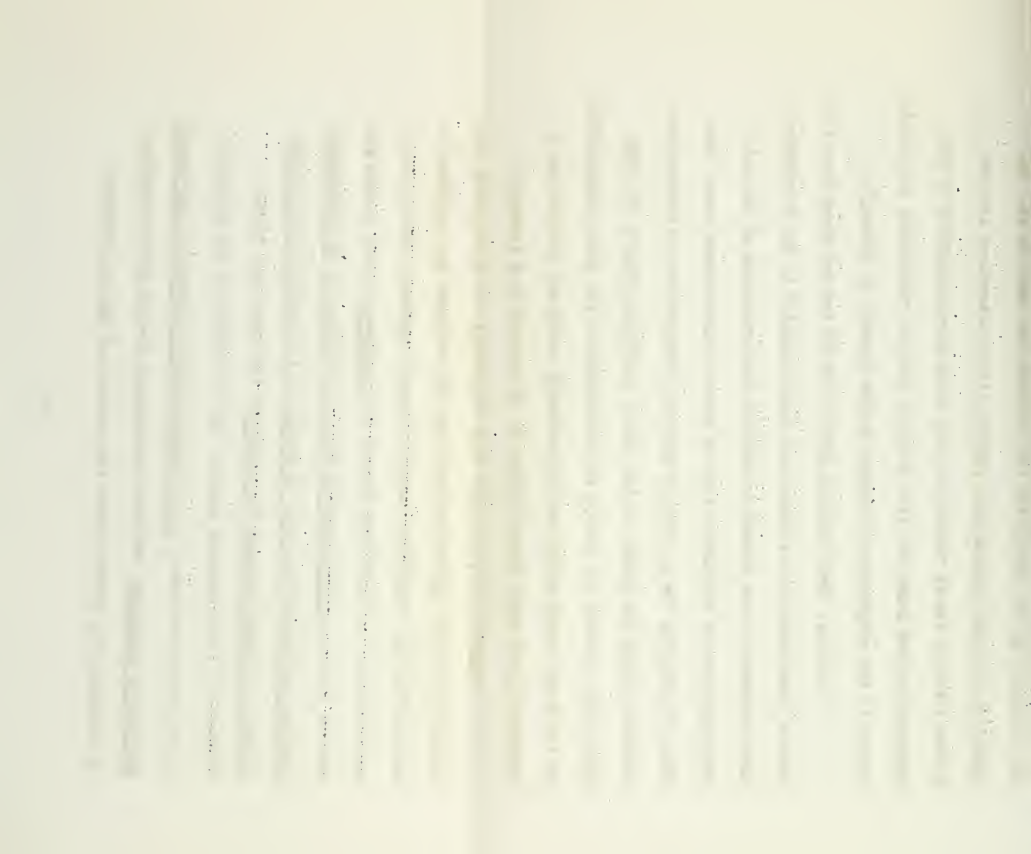
...

...

the equipment of the cafeterias and canteens was owned by it. The record in the case reveals that Factory Stores determined its own prices (Factory Stores record, p. 408) which were comparable to and competitive with those for like articles sold at restaurants and retail stores in the neighborhood (Factory Stores record, p. 404-405).

Clearly, these factual differences in the two cases show the line of demarcation to be drawn, and lead logically to the conclusion that Congress did not intend to withdraw the protection of the Act from employees of facilities such as those in the instant case. Here they are provided "as a means of assuring continued and efficient production" within the intent of the Senate Conference Report (95 Cong. Rec. 14874, October 18, 1949), as distinguished from those contemplated by the House Report which are independently owned and operated as a restaurant, but which merely happen to be located in a factory.

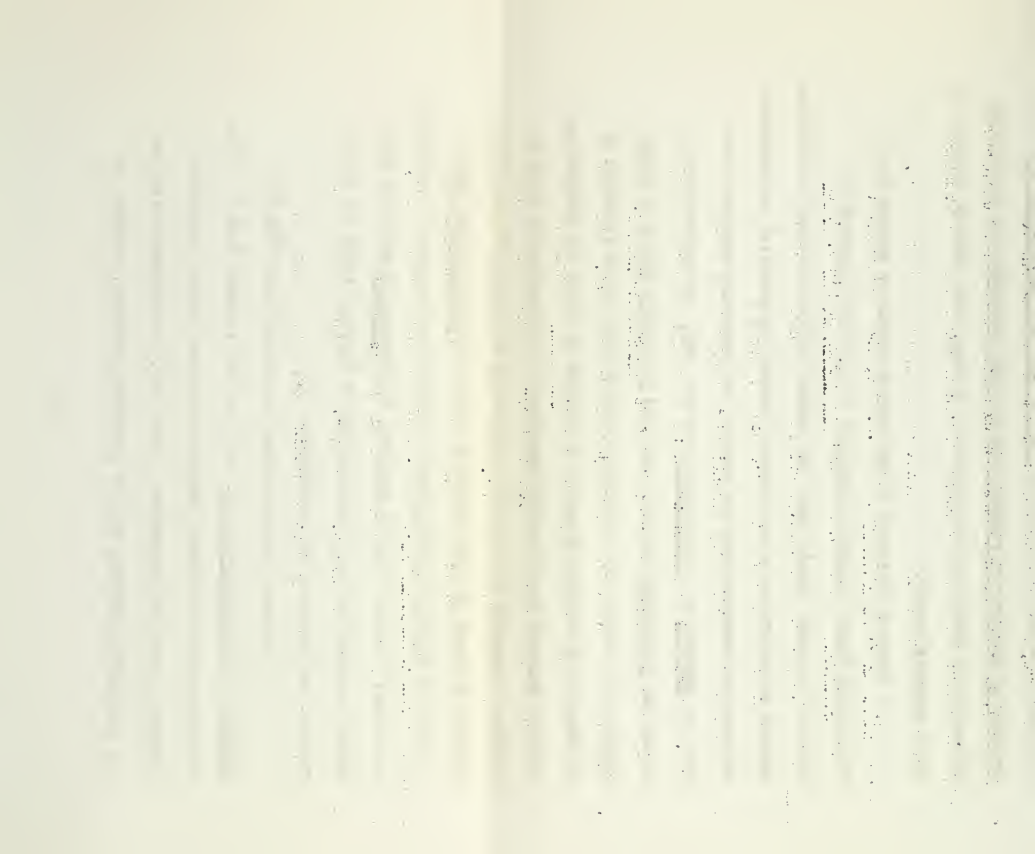
Plainly, too, the fact that technically an independent contractor may be the agency through which the services are provided is not controlling. The House Managers' Report expressly stated that employees such as those held covered in Kirschbaum, "will remain subject to the Act, notwithstanding they are employed by an independent employer performing such work on behalf of the manufacturer, mining company, or other producer for commerce" (95 Cong. Rec. 14929, October 18, 1949, emphasis added). And the Report of the Majority of the Senate Conferees, after giving specific approval to the Womack and Hanson decisions, and after enumerating several other categories of employees who remain within the coverage of the Act, stated:



directly essential to production whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer" (95 Cong. Rec. 14874-5, October 18, 1949, emphasis added).

Numerous decisions of the various courts of appeals and of the Supreme Court, rendered subsequent to the 1949 amendment to Section 3(j), have upheld under the amended section coverage of employees engaged in activities no more closely related or essential to production of goods for commerce than the messhall and bunkhouse employees here. Thus, in Mitchell v. Joyce Agency, 348 U.S. 945, the Supreme Court, citing the Kirschbaum decision, affirmed per curiam Durkin v. Joyce Agency, 110 F.Supp. 918 (N.D.Ill.), holding that guards furnished by an independent watchman agency to a producer of goods for commerce are "closely related" and "directly essential" to production of goods for commerce. Although the employer argued that the amended Section 3(j) excluded coverage of such employees (brief for Joyce Agency, Inc., p. 20), the Supreme Court summarily rejected this argument. Its brief per curiam decision cited as authority the Kirschbaum decision, thus plainly recognizing that the principles of coverage there set forth remained unaffected by the amendments.

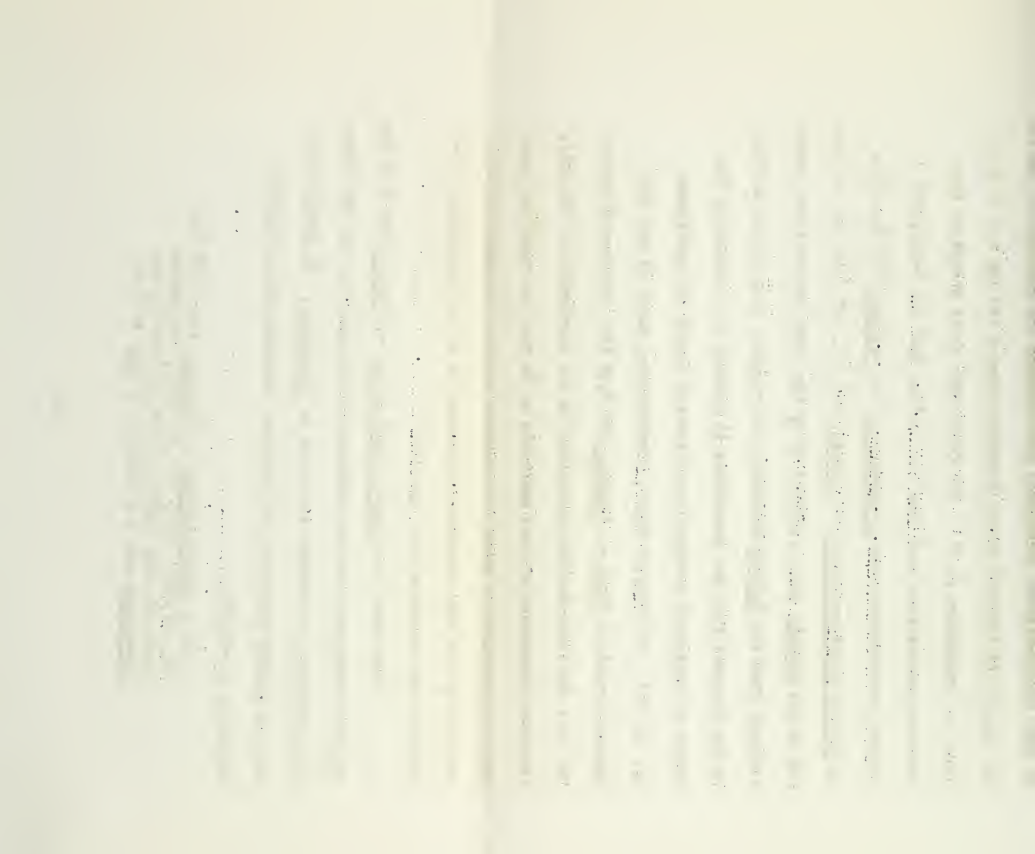
In its most recent decision on coverage under the Act, Mitchell v. C. W. Vollmer & Co., 349 U.S. 427 (decided June 6, 1955), the Supreme Court similarly recognized that no drastic change was intended by the 1949 amendments. There too, the employer relied on the amendment to Section 3(j) as precluding coverage, arguing, as



in such interpretative decisions, had extended the coverage of the Act far beyond its intended scope, Congress amended the law * * * (See brief for respondent p. 21). The Court made short shrift of this argument, emphasizing that this Act is "one that has been given a liberal construction from Kirschbaum Co. v. Walling, 316 U.S. 517, to Alstate Construction Co. v. Durkin, 345 U.S. 13" (349 U.S. at 429). And in the Alstate case, referred to by the Court in the above quoted language from the Vollmer decision, the employer also relied heavily on the argument that the amendments to Section 3(j) indicated "an intent to restrict" coverage under the Act (brief for petitioner pp. 21, 22). The Supreme Court, nevertheless, held, as had the Eighth Circuit in Tobin v. Johnson, 198 F.2d 130, certiorari denied, 345 U.S. 915 (also decided subsequent to the amendments of the Act), that the preparation of road materials to be used in repairing highways is production of goods for commerce whether the materials were produced by the road construction company or by an independent producer of the materials (345 U.S. 13).

This Court, in General Electric Co. v. Porter, 208 F.2d 805, has also recognized that the amendment to Section 3(j) did not destroy the principles of coverage set forth in Kirschbaum. In holding the Act, as amended applicable to employees rendering fire protection services, it stated:

* * * In Borden Company v. Borella, 1945, 325 U.S. 679, 65 S.Ct. 1223, 89 L.Ed. 1865, the Supreme Court not only reaffirmed its position in the Kirschbaum case but extended it (id. at 610).



* * * While Borden Company v. Borella, 1945, 325 U.S. 679, 65 S.Ct. 1223, 89 L.Ed. 1865, was decided prior to the 1949 amendments to the Act, the logic of that opinion still applies to the instant case. The legislative history, interpretations of the Administrator of the Wage and Hour Division, and court decisions convince us that the employees such as here involved were not removed from the coverage of the Act by the amendments. Tobin v. Union Nat. Bank of Little Rock, D. C. Ark., 1953, 112 F.Supp. 702; 15 Federal Register 2925, Section 776.17, 776.18; Statement of the Managers on the Part of the House, H. R. Report No. 11453, 81st Congress, 1st Session, Oct. 17, 1949 (id. at 811).

See also Russell Co. v. McComb, 187 F.2d 524 (C.A. 5) (holding the Act, as amended, applicable to a watchman guarding a building in which some production of goods for commerce was carried on); Union National Bank of Little Rock v. Durkin, 207 F.2d 848 (C.A. 8) (holding that maintenance employees in a bank building occupied primarily by the bank and some insurance companies were engaged in a "closely related process or occupation directly essential to the production" of goods for commerce by the bank and the insurance companies, within the meaning of the amended definition (id. at 851)); Mitchell v. Famous Realty, 211 F.2d 198 (C.A. 2), certiorari denied, 348 U.S. 823 (holding watchmen employed to look for fires in buildings leased to independent producers of goods for commerce to be within the coverage of the Act, as amended); Casa Baldrich, Inc. v. Mitchell, 214 F.2d 703 at 707 (C.A. 1) (holding employees engaged in the printing of payroll forms, production records and other office forms used within the State by independent producers of goods for commerce to be within the coverage of the Act as engaged in occupations "not only 'directly essential' but also 'closely related' to such production"); Mitchell

v. Mercer Water Co., 208 F.2d 900 (C.A. 3), affirming per curiam Durkin v. Mercer Water Co., 112 F.Supp. 656 (W.D.Pa.) (holding book-keepers of public utility companies supplying water and gas to industrial users who produced goods for commerce to be within the coverage of the Act, as amended); Mitchell v. Pascal System, 226 F.2d 391, 393 (C.A. 7) (holding employees of an automobile rental company repairing and maintaining automobiles leased to independent "industrial firms which use them in the production of goods for commerce" to be within the coverage of the Act, as amended).

As will be noted, many of these cases including Joyce Agency, supra, involved employees of an independent agency furnishing materials or services to producers of goods for commerce. Thus, that distinction is plainly immaterial, both under the amendment to Section 3(j) as well as prior thereto. As the Second Circuit, citing Kirschbaum, expressly stated in its recent decision in Mitchell v. Fancus Realty, 211 F.2d 198 at 199:

Nor can the Walton case be distinguished on the ground that the employer was engaged in the production of goods for commerce, while here, not the employer but the employer's tenants, are so engaged. It is the relationship of the service rendered by the employee in respect to the production of goods for commerce rather than the relationship of the business of the employer to that production which is of critical importance.

2/ To the same effect are the decisions in Messner v. Traders Compress Co., 107 F.Supp. 354 (E.D.Okla.), reversed on other grounds, 199 F.2d 8 (C.A. 10), certiorari denied, 344 U.S. 909; Broach v. McPherson, 220 Ark. 457, 248 S.W.2d 355, 357 (S.Ct. Ark., 1952), reaffirmed 257 S.W.2d 565 (S.Ct. Ark., 1953); Tobin v. Promersberger, 104 F.Supp. 314 (D. Minn., 1952); Tobin v. Hayes, 11 WH Cases 110, 22 Labor Cases, par. 67, 208 (S.D.Fla., 1952); Tobin v. Cherry River Boom & Lumber Co., 102 F.Supp. 763 (S.D.West Virginia, 1952).

THE first discovery of America was made by Christopher Columbus in 1492.

He sailed from Spain on the 3rd of September, and after a long and dangerous voyage, he reached the island of San Salvador on the 12th of October.

He then sailed on to the island of Cuba, and then to the island of Hispaniola.

He then sailed on to the island of Puerto Rico, and then to the island of St. John.

He then sailed on to the island of St. Thomas, and then to the island of St. Peter.

He then sailed on to the island of St. Paul, and then to the island of St. George.

He then sailed on to the island of St. Mark, and then to the island of St. Luke.

He then sailed on to the island of St. Andrew, and then to the island of St. David.

He then sailed on to the island of St. Elizabeth, and then to the island of St. James.

He then sailed on to the island of St. John, and then to the island of St. Peter.

He then sailed on to the island of St. Paul, and then to the island of St. George.

He then sailed on to the island of St. Mark, and then to the island of St. Luke.

He then sailed on to the island of St. Andrew, and then to the island of St. David.

He then sailed on to the island of St. Elizabeth, and then to the island of St. James.

He then sailed on to the island of St. John, and then to the island of St. Peter.

He then sailed on to the island of St. Paul, and then to the island of St. George.

He then sailed on to the island of St. Mark, and then to the island of St. Luke.

He then sailed on to the island of St. Andrew, and then to the island of St. David.

He then sailed on to the island of St. Elizabeth, and then to the island of St. James.

He then sailed on to the island of St. John, and then to the island of St. Peter.

He then sailed on to the island of St. Paul, and then to the island of St. George.

He then sailed on to the island of St. Mark, and then to the island of St. Luke.

He then sailed on to the island of St. Andrew, and then to the island of St. David.

And as the district court had expressly noted in Joyce Agency:

* * * The legislative history of the amendment clearly indicates that there was no intention to overturn the existing law and exclude this class of employees from coverage by the Act. A careful examination also indicates that the amendment is expressed in the language of the Kirschbaum case. The traditional and prevailing view on this class of employees was adopted in the case of Russell Co., Inc. v. McComb, supra [187 F.2d 524] decided after the amendment [110 F.Supp. at 923].^{3/}

In the only court of appeals interpreting the amended language of the Act in connection with industrial feeding, the Fourth Circuit held that even workers in a factory restaurant, if the conditions were analogous to those in an isolated mining or lumber camp such as in Womack, would be entitled to the benefits of the Act.

^{4/}
Hawkins v. E. I. Du Pont de Nemours & Co., 192 F.2d 294. And in Tobin v. Promersberger, 104 F.Supp. 314 (D.Minn., 1952), the court, in holding that occupations in logging camps of cooks, cookieeers, bull cooks, barn boss, watchman, and clerk, were closely related and directly essential to the production of goods for commerce, stated:

Defendants cite legislative history to the effect that restaurant employees were not intended to be

^{3/} The Seventh Circuit reversed the district court's decision in Joyce (211 F.2d 241), but as previously noted the Supreme Court, in a brief per curiam opinion handed down on February 28, 1955, reversed the judgment of the Seventh Circuit and affirmed in toto the judgment of the district court, citing the Kirschbaum decision (348 U.S. 945).

^{4/} On the subsequent appeal of that case, after remand, the court indicated that the question on the coverage issue was doubtful (E. I. Du Pont de Nemours & Co. v. Harrup, not as yet officially reported but printed in 12 WH Cases 693); but only because of the failure of evidence to prove the allegations of the complaint on the issue, and the court did not recede from its prior opinion. Indeed, the court cited with apparent approval the majority opinion in the instant case (12 WH Cases at 694).

within Section 3(j) of the Act. But it is obvious that the legislators making the comments cited by defendants were speaking of the usual, common situations, not of those cases which, like the instant case, are not the usual prevalent variety. The legislative history aptly shows that the principle of Kirschbaum Co. v. Walling, supra, was not destroyed by the amendment (104 F.Supp. at 317).

Similarly, in Tobin v. Cherry River Boom and Lumber Co., 102 F.Supp. 763 (S.D.West Virginia, 1952), the court held that cook house employees were within the coverage of the Act, citing this Court's decision in Consolidated Timber Co. v. Womack, 132 F.2d 101; Hawkins v. E. I. Du Pont de Nemours and Co., 192 F.2d 294 (C.A. 4); and Hanson v. Lagerstrom, 133 F.2d 120 (C.A. 8) (102 F.Supp. at 768).

Appellees rely heavily on the recent decision of the Tenth Circuit in Juarez v. Kennecott Copper Corporation, 225 F.2d 100 (Petition, p. 24). But plainly, that case is inapposite to a determination of coverage here. It involved no more than the employees of a semi-public hospital, caring for patients consisting of the general public as well as members of the mining community. Indeed, approximately 80 percent of its operations was devoted to serving the general public and only 20 percent to the mining employees.^{5/} In addition, the

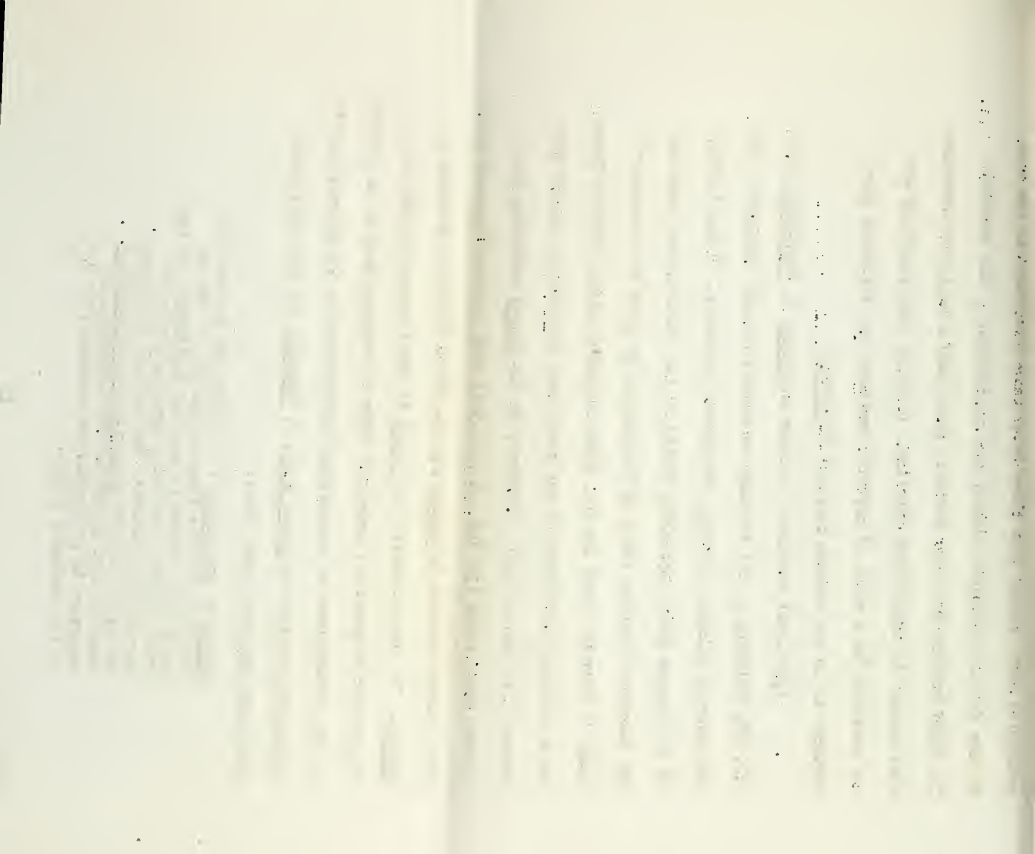
^{5/} The maintenance of the hospital in Juarez may thus be likened to the maintenance of the village, operated as "an ordinary town," where "some of the employees," but also their families and mostly "others," lived, in Maneja v. Waiialua Agricultural Company, 349 U.S. 254 at 271. It is also comparable to the rental of houses by Anaconda to its family employees in the instant case, for which no coverage is asserted. The Administrator has never construed the amended Section 3(j) as covering the maintenance of that type of facility even though, in a broad sense, it may be considered necessary to production. The line of distinction is that in the one case the furnishing of facilities is directly essential and integrated with production whereas in the other case it is only indirectly so. This is the very distinction Congress drew in enacting the amendments.

1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

undisputed facts showed that there were ample facilities in the area to care for the employees without the maintenance of the hospital. The chief surgeon and other doctors, while paid a salary by defendant, also engaged in independent practice. Clearly, the facilities were not provided "as a means of assuring continued and efficient production" as in the instant case and in Womack.

Appellees' continued reliance on McLeod v. Threlkeld, 319 U.S. 491 (Petition p. 19) is also, we submit, clearly misplaced. As the majority opinion correctly recognizes (Opinion p. 5) and indeed, as the Supreme Court explicitly stated in its opinion, that case was not concerned with the scope of "production of goods for commerce" phase of coverage under the Act, since McLeod's duties (cooking foods for a railroad maintenance of way crew) were "completely outside that clause" (319 U.S. at 493). Moreover, in its McLeod decision, the Supreme Court cited (319 U.S. at 493, 501) with apparent approval both this Court's decision in Womack and the Eighth Circuit's decision in Hanson. The inapplicability of McLeod to cases concerned with the "production of goods for commerce" phase of coverage such as is involved in the instant case is conclusively demonstrated by the Supreme Court's subsequent decision in Armour & Co. v. Wantock, 323 U.S. 126, where the Court expressly ruled that:

McLeod v. Threlkeld, * * * which did exclude the employee from the scope of the Act, is not in point here because it involved application of the other clause of the Act, covering employees engaged "in commerce," and the test of whether one is in commerce is obviously more exacting than the test of whether his occupation is necessary to production for commerce (323 U.S. at 131, emphasis added).



the Court summarily affirmed appellant's application for a writ of habeas corpus. The Court held that the "production of goods for commerce" in Schulte Co. v. Gangi, 328 U.S. 108 at 119. And, although relied on heavily by the employers in both Joyce (brief pp. 16, 18, 24) and Alstate (brief p. 26), discussed supra, pp. 17, 18, 21, the Supreme Court, of course, did not consider that decision applicable to those cases. Indeed, the Supreme Court has never applied the ruling in McLeod to any case involving the "production of goods for commerce" phase of coverage. Nor have they even extended it to other situations involving "in commerce" coverage. See the Vollmer case, discussed supra p. 17 where, despite the fact that it was heavily relied on by the employer (Vollmer's brief pp. 5, 6 and 9), the ruling in McLeod was not applied.

II

THE SECTIONS 13(a)(1) AND 13(a)(2) EXEMPTIONS ARE CLEARLY INAPPLICABLE SINCE THE MESSEHALL AND LODGING FACILITIES ARE OPERATED AS INTEGRAL PARTS OF ANACONDA'S PRODUCTION OPERATIONS

A. The Messhall And Lodging Facilities At The Mine Do Not Constitute A "Retail Or Service" Establishment Within The Meaning Of Section 13(a)(2).

Appellee is correct in its statement (Petition, pp. 8, 9) that in determining the applicability of the amended Section 13(a)(2) it is necessary to apply the tests specifically enumerated in that section. These are:

1. The establishment must be engaged in making sales of goods or services or of both.
2. Fifty percent of the establishment's annual dollar volume of sales of goods or services must be made within the State in which the establishment is located.

...the ... of the ...
...the ... of the ...
...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

annual dollar volume of sales of such goods or services must not be for resale.

4. Seventy-five percent of the establishment's annual dollar volume of sales of goods or services must be recognized as retail sales in the particular industry.

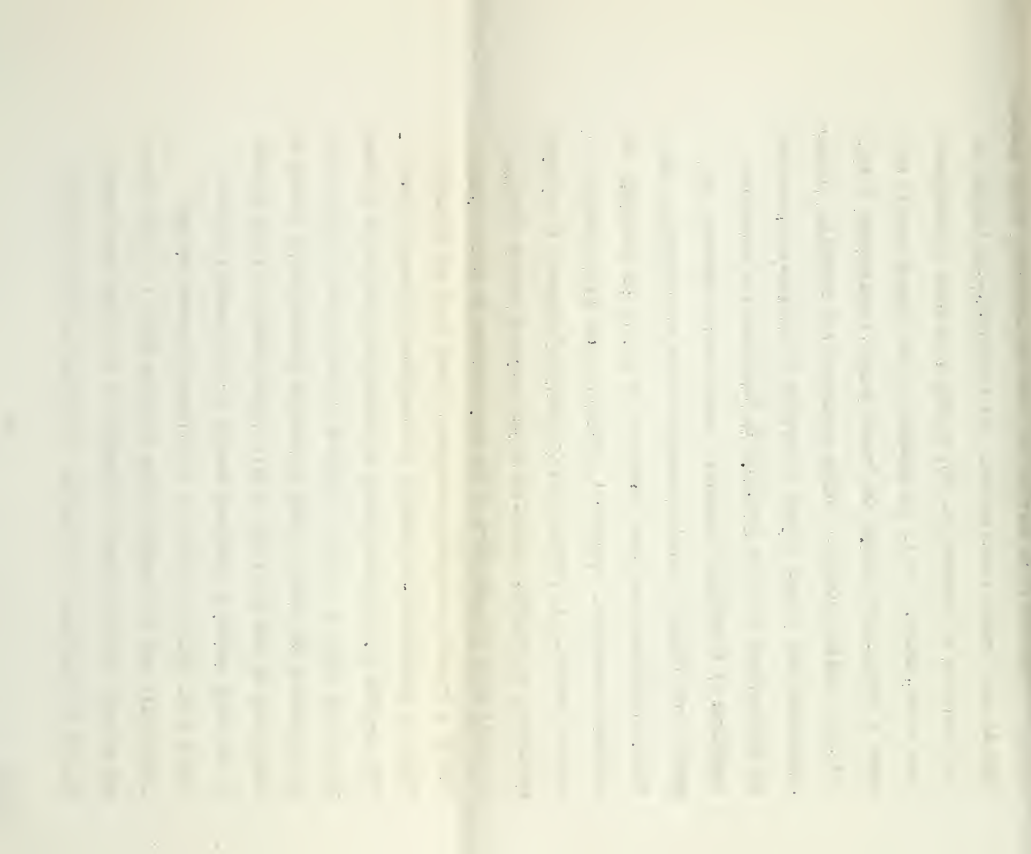
But the majority opinion was entirely correct in its conclusion that where, as here, the operation of facilities is conducted as an integrated part of the productive operations of a mining company, rather than to serve the consuming public generally, such operation "is inconsistent with any conclusion that it is a retail enterprise" (Opinion, p. 7). As we shall show, none of the sales, under such circumstances, are "recognized as retail sales in the particular industry" within the meaning of the fourth enumerated test.

As pointed out in our reply brief (p. 8), this Court's decision in the Womack case and the Eighth Circuit's decision in Hanson are controlling here. In rejecting a claim identical to that of the appellees here, this Court, in the Womack case stated:

In our opinion the exemption invoked was not intended to apply in a situation such as confronts us in the instant case. Here the cookhouse was a "necessary," part of the Company's production of goods for commerce. It was not operating with the intent or purpose of showing a profit to the owners from the sale of food or service, but to render a very necessary assistance to the business of the Company, which was the production of logs in interstate commerce. * * * Neither cookhouse was in competition with any private restaurant for there is no evidence of an effort to secure the patronage of the general public; the service was sold at cost to those whom the cookhouse was intended to serve: the loggers. The principal activity of the cookhouse definitely was not to furnish service to the consuming public, as such, but was to serve the employees of the company (132 F.2d 101, 107).

[The text on this page is extremely faint and illegible. It appears to be a multi-paragraph document, possibly a letter or a report, with several lines of text visible across the page.]

There can be no question but that the bunkhouse in the instant case is not a retail establishment. Its occupancy being limited to male employees of Anaconda (R. 58), it can in no sense be considered open to the public. Nor is the messhall in the instant case in any sense a "restaurant" meeting the "retail sales" requirements of the Act under Section 13(a)(2). Unlike cockhouses and messhalls, ordinary restaurants make "retail sales" of services to the general public and are not operated solely or primarily to facilitate the productive operations of a particular company. Restaurants are operated for profit, are located at readily accessible sites in a community, and through advertising and other means seek to attract the patronage of the public generally. Appellees' messhall, on the other hand, is operated primarily to provide food for Anaconda's miners; it is owned, subsidized, and closely controlled by the Anaconda Company (Fdg. 16, R. 64-65) as an integral part of the main business of mining rather than as a separate profitable enterprise. Meal times are adjusted solely to accommodate the needs of the employees of Anaconda whose mine operates on a two-shift basis and whose mill operates on a three-shift basis (Fdg. 3, R. 57). Employees in the mine whose duties make it impractical for them to leave the working area eat their lunches at their place of work (Fdg. 15, R. 64). Approximately 20 to 25 percent of the meals served by appellees consist of box lunches for these miners (Plf. Exh. C, R. 49). To a very limited extent and only incidentally does the messhall serve outsiders (Fdg. 1, R. 53). There are no signs indicating that the messhall is an eating establishment (R. 85) and appellees do no highway advertising of their facilities



(Fdg. 5, R. 57). As noted supra, p. 4, not only does the "subsistence agreement" under which appellees operate prohibit the use of the facilities for purposes other than that set forth in the agreement (R. 41), but a sign on one of the access roads to the Anaconda properties warns "unauthorized persons" to "keep out" (Plf. Exh. 1, R. 86).

Appellees' assertion that since the messhall is available to the public "to a limited extent," it meets the retail establishment standards is plainly without merit. (br. p. 7-). As the court below specifically found, only occasionally and incidentally are persons other than employees of Anaconda served at the messhall (Fdg. 1, R. 53). Under virtually identical circumstances, this Court in the Womack case rejected such a contention, holding that the fact that meals at the cookhouse were served to occasional persons who were not employees of the logging camp did not convert the cookhouse into a public restaurant or service establishment. ^{2/} There the district court had held that the cookhouse located at the company's headquarters in Glenwood was exempt because it was frequented by a few members of the public. This Court, in reversing, pointed out that the distinction was not fundamental,

6/ Only Anaconda "advertises" the facilities, and then the "advertising" is not for the purpose of attracting the public but for the purpose of attracting an adequate supply of labor for its mining operations (Plf. Exh. AA, R. 51).

7/ In the Womack case there were six persons who were not employed in the logging operations but who were employed in other businesses in Glenwood who regularly took their meals at the cookhouse. In addition an average of 10 meals a day were served to strangers--the general public [132 F.2d at 106]. In the instant case an average of only 168 meals per month or 5 3/5 meals per day were served to outsiders (Fdg. 5, R. 57). In addition, the lodging facilities here are limited exclusively to employees of the Anaconda Company (Fdg. 5, R. 58).



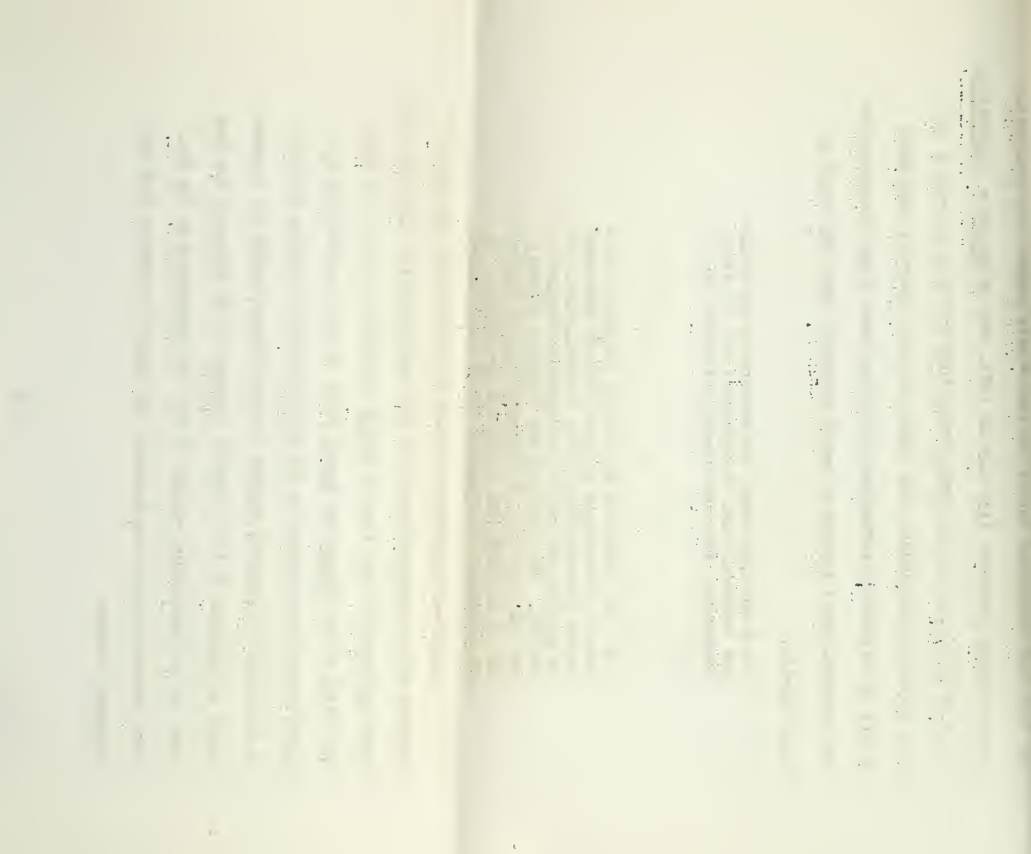
and that both cookhouses served the same "basic purpose and integration in the Company business" (132 F.2d at 107). And in Hanson v. Lagerstrom, 133 F.2d 120 (C.A. 8), the facts reveal that from 4 to 6 meals a day were served to the public. The Eighth Circuit, however, made short shrift of defendant's contention there that under these circumstances the cookhouse was a service or retail business. Said the court at pages 122-123:

* * * In other words, the service to the public was incidental and so negligible and relatively unimportant that the exemption involved cannot apply.

* * * * *

* * * If, among his activities, defendant maintained a restaurant operated without reference to his industrial activity, it should then not be regarded as part of his business subject to the Act. The cookhouse was intended primarily for the benefit of defendant's logging employees and to increase his production operations. It is certainly not a typical retail establishment.

Appellees urge that the tests for determining the applicability of the exemption under the 1949 amendments are different from those applicable at the time of Monack (Petition, p. 10). But that the ruling of the Monack and Hanson cases is still controlling and authoritative with respect to the applicability of Section 13(a)(2) to cookhouses in isolated logging or mining camps, which are operated simply as adjuncts to the principal business of an employer, was made clear in the legislative reports on the 1949 amendments to the Act. Thus, Senator Holland, who sponsored the adopted amendment made the following remarks:



duced has been a product of several months work and discussion. It was placed in its present form some 2 months ago and has had wide circulation. I have had numerous inquiries as to its effect upon various situations and its effect upon various court decisions. I have been asked the following questions:

* * * * *

Question. In Boutell v. Walling (327 U.S. 463) the Supreme Court held that a repair establishment, affiliated with an interstate motor carrier and engaged exclusively in repairing the trucks of such motor carrier was not exempt as a service establishment. Would that case be decided any differently under the proposed amendment?

Answer: No; for the reason that the servicing of such a repair establishment would not be recognized as retail in the industry. This is so because such establishment is not open to the general public and is really the same as a repair department operated by the interstate motor carrier itself. A repair establishment affiliated with an interstate motor carrier is not like a garage patronized by auto and truck owners generally (95 Cong. Rec. 12505, August 30, 1949). [Emphasis added].

That this is a general principle, not restricted to this one situation, but applicable equally to other similarly affiliated facilities is made clear by the generality of the language in the Report of the Majority of the Senate Conferees where it is stated:

The conference agreement exempts establishments which are traditionally regarded as retail. Establishments which are not ordinarily available to the general consuming public (such as the motor-carrier repair affiliate considered in Boutell v. Walling (327 U.S. 463) * * * will not become retail or service establishments under the provisions of the conference agreement" (95 Cong. Rec. 14877, October 18, 1949) [Emphasis added].

in explaining the effect of the amendments after the conference agreement stated:

The conference agreement does not change the status, insofar as the retail or service exemption is concerned, of establishments which are not ordinarily available to the general consuming public (95 Cong. Rec. 14912, October 18, 1949).

Moreover, Congress in drafting the amendments to this Act was well aware that restaurants were generally exempt as retail establishments under Section 13(a)(2). There thus would have been no occasion for all the legislative discussion regarding coverage under Section 3(j) of industrial feeding facilities, or for the careful distinction between lumber camp cookhouses and independently operated factory restaurants (see supra pp. 9-13), if all such feeding establishments were exempt as retail restaurants. Plainly employees engaged in cookhouses of the Womack and Hanson type were not regarded by Congress as working in exempt "restaurants" under Section 13(a)(2). Such facilities which are so integrated with production operations obviously have no independent personality as retail establishments.

Under these circumstances, appellees could introduce no evidence whatsoever to show that the sales of the bunkhouse were "recognized as retail sales in the particular industry." And the only evidence which appellees did, and could possibly, adduce purporting to bear on the recognition point consisted of the self-serving opinions of interested parties (see appellant's reply brief, pp. 18 and 19). As Judge Carter so aptly characterized this opinion evidence, it was tantamount to "getting a witness on the stand in a criminal case and

[illegible]

defendant negligent?' in a negligence case" (N. 143). In fact, in the instant case, it is the same as putting the defendants themselves on the stand and asking them such questions. But what is important is that there is plainly no occasion for taking any evidence at all on the question of what percentage of an establishment's sales are recognized as retail in the industry where, as here, facilities are operated simply as an integral part of production operations rather than to serve the general consuming public. The legislative history to the amendments, we submit, shows clearly that under such circumstances, as a matter of law, none of such sales are retail.

B. Appellees' Employees Engaged In The Operation
Of The Messhall And Lodging Facilities For Employees
At The Anaconda Mine Are Not Employed In A "Local
Retailing Capacity" Within The Meaning Of Section
13(a)(1)

Appellees' assertion that this Court erred in failing to consider whether its employees were exempt under Section 13(a)(1) (Petition, p. 3) is completely without substance. As pointed out in appellant's reply brief (p. 19), such employees were not employed in a "local retailing capacity" under Section 13(a)(1) anymore than they were employed by a "retail or service establishment" under Section 13(a)(2).

Section 13(a)(1) provides an exemption for "any employee employed in a * * * local retailing capacity" as such term is defined and delimited by regulations of the Administrator. The Administrator's regulation (29 CFR, 1955 Supp., 541.4) defines an employee employed in a "local retailing capacity" as one--

(a) who customarily and regularly is engaged in --

- (1) making retail sales of goods or services of which more than 50 percent of the dollar volume are made within the State where his place of employment is located, or
- (2) performing work immediately incidental thereto, such as the wrapping or delivery of packages and
- (b) whose hours of work of a nature other than those described in paragraphs (a)(1) or (a)(2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer.

Thus, under the Regulations an employee to qualify for exemption must be engaged either in making retail sales or in performing work incidental thereto. As we have pointed out in our argument on the Section 13(a)(2) issue, supra, p. 25, the messhall and lodging operations conducted by appellees at the Anaconda mine are wholly foreign to the concept of "retail" sales. Accordingly, none of these employees are engaged in making retail sales or in performing work incidental thereto.

The Supreme Court has expressly recognized that the Sections 13(a)(1) and 13(a)(2) exemptions are merely complementary and were intended to exempt only employees engaged in traditionally "local retailing" capacities. Thus, it stated in Phillips Co. v. Walling, 324 U.S. 490 at 497:

* * * Congress was interested in exempting those regularly engaged in local retailing activities and those employed by small local retail establishments, epitomized by the corner grocery, the drug store and the department store. * * * Section 13(a)(2) is a part of the Act only because of the fear that Section 13(a)(1) in exempting employees regularly engaged in a "local retailing capacity," did not clearly exclude those employed by local retailers who are situated near state lines and who make occasional interstate sales. Walling v. Jacksonville Paper Co., 317 U.S. 564, 571.

...the ... of ...
...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...

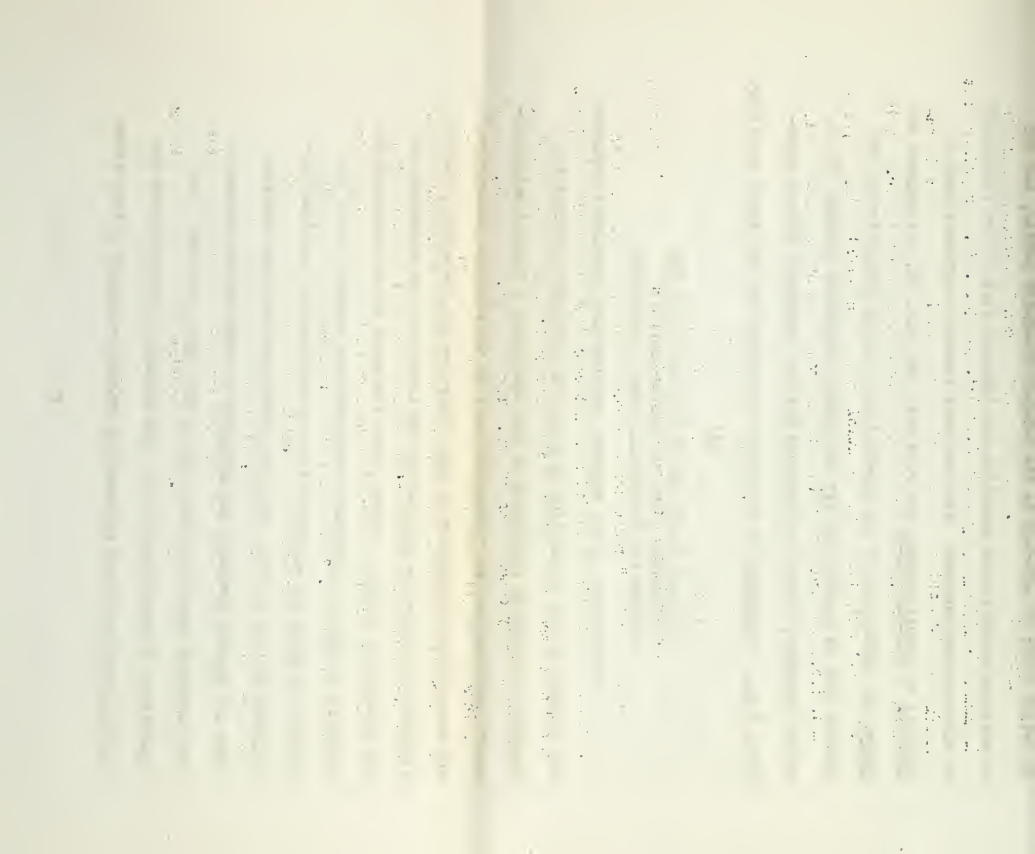
...the ... of ...
...the ... of ...

to retail sales or services to the general consuming public, and not to services which are an essential and integral part of the production or manufacturing process. This was only recently expressly held in Mitchell v. Pascal System, 226 F.2d 391, 394 (C.A. 7). As pointed out supra, the furnishing of the messhall and lodging facilities in the instant case is plainly not for the general consuming public. It is, on the contrary, simply an essential part of Anaconda's mining operation, i.e., a component of interstate production and not local retailing.

III

THE CASE SHOULD NOT BE REMANDED SINCE THE CONCLUSIONS EXPRESSED IN THE MAJORITY OPINION ARE ESSENTIALLY LEGAL CONCLUSIONS

The rulings in the majority opinion that appellees' employees are engaged in the "production of goods for commerce" and that the messhall and lodging facilities do not constitute a "retail establishment" since they are an "integrated part of the Anaconda enterprise," are essentially conclusions of law. They are not, we submit, factual findings which must be supplied by the trial court as suggested in the dissenting opinion. Indeed, even the court below considered the question of whether appellees' employees were engaged in the "production of goods for commerce" to be a conclusion of law (See Conclusions of Law, R. 73). While its conclusion that the employees were not covered obviated the necessity of rendering an opinion on the exemption issue, that also, as we have shown in Point II is essentially a conclusion of law. The essential relevant facts (as distinguished from mere self-serving opinion evidence) on both issues



the nature of appellees' operations, and the area of dispute concerns only the legal inferences to be drawn from such facts.

The courts have held specifically that what constitutes "interstate commerce" or "production of goods for commerce" under the Fair Labor Standards Act is essentially a legal question. Thus, in its recent decision in Mitchell v. Denton, 224 F.2d 596 at 598, the Fifth Circuit, in holding that the trial court erred in submitting the coverage question to the jury, stated "On the basis of these facts, the employees were engaged in the production of goods for commerce as a matter of settled law * * *." See also Clyde v. Broderick, 144 F.2d 348, 349 (C.A. 10); Nick v. United States, 122 F.2d 660, 673 (C.A. 8), certiorari denied, 314 U.S. 687, rehearing denied 314 U.S. 715, rehearing denied 316 U.S. 710, reaffirmed on this point in Hulahan v. United States, 214 F.2d 441, 446 (C.A. 8), certiorari denied 348 U.S. 856; Kantor v. Garchell, 150 F.2d 47 (C.A. 8). Any decision on this question necessarily involves legal conclusions, moreover, that have been settled by decisions of the Supreme Court and the United States Courts of Appeals as well as interpretations of the legislative history of the Act and its amendments.

Similarly, the rulings in the majority opinion that the facilities are "an integrated part of the Anaconda enterprise" and thus not a "retail establishment" are simply ultimate inferences from undisputed evidence, largely stipulated. The Supreme Court, as well as this Court and other Courts of Appeals, have repeatedly thus viewed and dealt with questions concerning both coverage and the

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

applicability of the Section 13(a)(2) exemption under this Act. Thus in Mitchell v. C. W. Vollmer & Co., 349 U.S. 427, in its most recent decision on coverage under the Fair Labor Standards Act (decided June 6, 1955), the Supreme Court reversed the holdings of both the Court of Appeals and the district court that employees performing work in the construction of an alternate route for an existing interstate instrumentality were not engaged "in commerce." And in Roland Co. v. Walling, 326 U.S. 657, although the trial court had held that employees of an establishment furnishing repair service for equipment used in the production of goods for commerce were not covered, and also that the establishment was exempt as a retail establishment under Section 13(a)(2), the Supreme Court affirmed the Fourth Circuit's reversal on both issues. The recent decision of the Seventh Circuit in Mitchell v. Pascal System, 226 F.2d 391, involved precisely the same issues that are here involved. There the Court of Appeals not only reversed the trial court on the coverage and Section 13(a)(2) questions, but also expressly held that Section 13(a)(1) was inapplicable although that question had not been considered by the district court (See district court decision in 12 WH Cases 143).

Directly in point is this Court's decision in Consolidated Timber Co. v. Womack, 132 F.2d 101, reversing the decision of the district court which had held one of the cookhouses there involved exempt as a retail establishment under Section 13(a)(2). As we have pointed out supra, pp. 2-6, that case is factually indistinguishable from the instant case. See also Mitchell v. Famous Realty, Inc., 211 F.2d 198 (C.A. 2), certiorari denied, 348 U.S. 823, where despite the

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

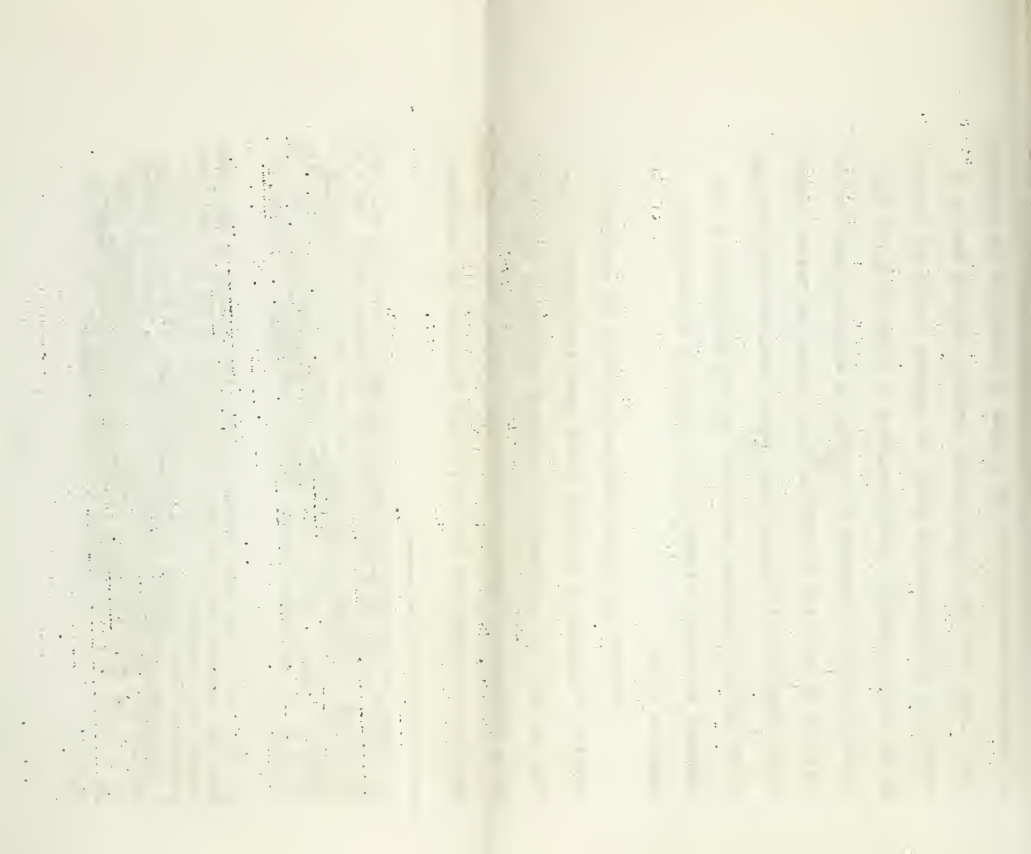
...the ... of the ...

holding of the district court that the employees involved had "no close or immediate connection with the process of production for commerce," (111 F.Supp. 659) the Second Circuit reversed, holding them to be engaged in the production of goods for commerce within the coverage of the Act, as amended. Other decisions in which the courts have reversed on either questions of coverage or exemption under Section 13(a)(2), or both, are so numerous as to require no further comment. In all these cases the courts have plainly considered the decisions of the district judges as reviewable^{9/} and the application of the statutory standards to facts largely undisputed as essentially questions of law.

Nor have the courts hesitated to review and reverse even so-called "findings" of district courts where they involve no more than, as here, the application of statutory definitions under the Act to substantially undisputed evidentiary facts. Thus, in Rutherford Food Corp. v. McComb, 331 U.S. 722, a case involving the question of

8/ Mitchell v. Chambers Construction Company, 214 F.2d 515 (C.A. 10); Mitchell v. Brown, 224 F.2d 359 (C.A. 8); certiorari denied, 350 U.S. 875; McComb v. Wyandotte Furniture, 169 F.2d 766 (C.A. 8); Walling v. Friend, 156 F.2d 429 (C.A. 8); Bracey v. Luray, 138 F.2d 8 (C.A. 4); certiorari denied, 332 U.S. 790; Walling v. Goldblatt Bros., 128 F.2d 778 (C.A. 7); certiorari denied, 318 U.S. 757; Slover v. Mathen, 140 F.2d 258 (C.A. 4).

9/ Decisions of the trial courts upholding the validity of pay plans under the overtime requirements of Section 7(a) of the Act have also plainly been considered reviewable on appeal as involving largely a question of law. Walling v. Helmerich & Payne, 323 U.S. 37; Walling v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, rehearing denied, 326 U.S. 804; Bay Ridge Co. v. Aaron, 334 U.S. 446; McComb v. Roif, 181 F.2d 726 (C.A. 1); McComb v. Sterling Ice & Cold Storage Co., 165 F.2d 265 (C.A. 10); Walling v. Unimam Grain Co., 151 F.2d 381 (C.A. 7).



fact which emphasized the independent aspects of meat boners in a slaughterhouse and concluded that these workers were not "employees" within the meaning of the Fair Labor Standards Act. (See detailed account of the findings in 156 F.2d at 517-519). Despite the trial court's "findings of fact," the Tenth Circuit reversed and its decision was affirmed by a unanimous Supreme Court. Similarly, in United States v. Silk, 331 U.S. 704, despite "the concurrence of the two lower courts" in "finding" the unloaders of coal cars to be independent contractors rather than "employees," the Supreme Court reversed on the ground that "These inferences were drawn by the courts from facts concerning which there is no real dispute." 331 U.S. at 716. This Court reached a similar result on the same question in Tobin v. La Duke, 190 F.2d 677 (C.A. 9) where, although the trial court had specifically found that certain workers were "independent contractors" and not "employees" under the Act, this Court reversed per curiam, stating:

There is no material dispute on the basic facts of the arrangement and relationship between appellee and the four persons involved. They are summarized in a stipulation of the parties, further supplemented by uncontradicted evidence introduced on the trial. The conclusion to be drawn from the facts is essentially one of law.

And in considering a question of "hours worked" under the Act this Court in General Electric Co. v. Porter, 208 F.2d 805 at 814, certiorari denied, 347 U.S. 951, stated:

The ultimate determination of whether or not sleeping time is work time presents a mixed question of law and fact. In reviewing such a mixed question we may substitute our judgment for that of the trial court.

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...

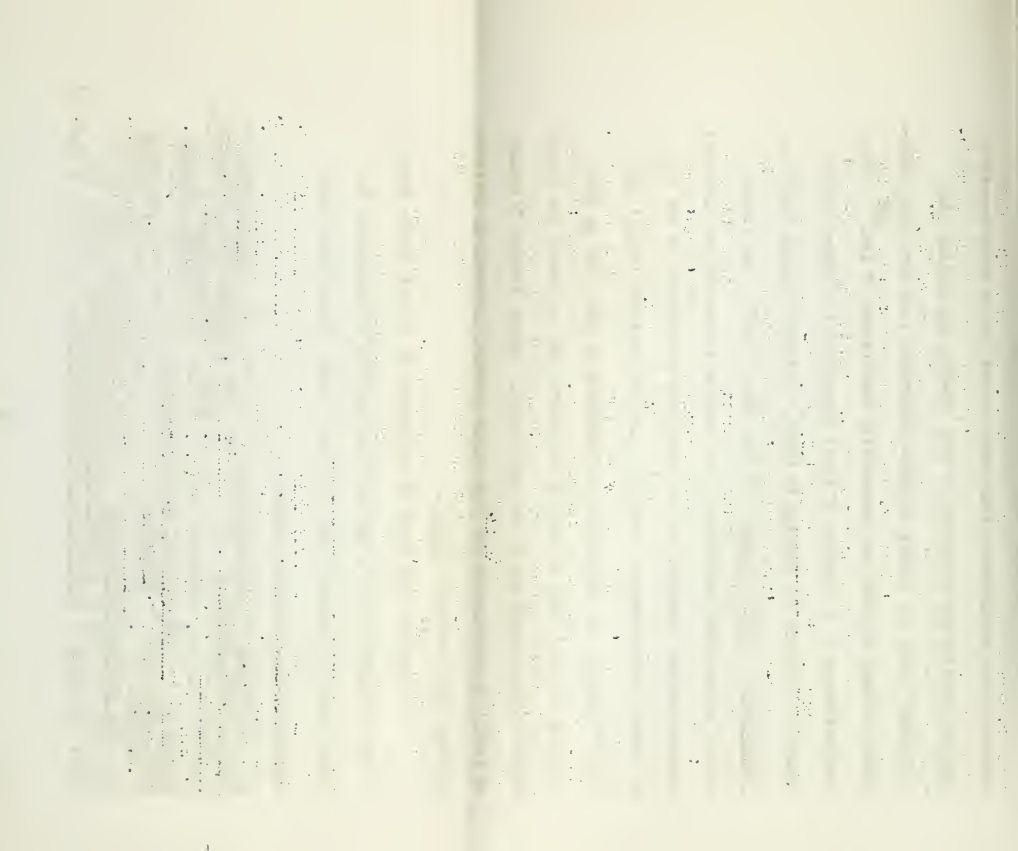
...the ... of the ...

...the ... of the ...

The Supreme Court in a number of other decisions, and also numerous other decisions of this Court as well as of other courts of appeals, confirm the soundness of thus viewing and dealing with "findings" which are simply ultimate inferences from basically undisputed evidence or which are essentially conclusions of law.^{10/} "The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based," said the Supreme Court in Baumgartner v. United States, 322 U.S. 665, 670-671, "The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact,' it may involve the very basis on which judgment of fallible evidence is to be made" (ibid.).

We submit that there is no dispute as to the "basic facts of the arrangement" here, and that the majority's conclusions are simply legal inferences drawn from such facts. Since these legal

10/ Baumgartner v. United States, 322 U.S. 665, 670; United States v. United States Gypsum Co., 333 U.S. 304, 394; Equitable Life Assur. Soc. v. Ireland, 123 F.2d 462, 464 (C.A. 9); Smith v. Royal Ins. Co., 125 F.2d 222, 224 (C.A. 9), certiorari denied, 316 U.S. 695; Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 178 F.2d 541 (C.A. 9); Stuart Oxygen Co. v. Josephian, 162 F.2d 857 (C.A. 9); see also Orvis v. Higgins, 180 F.2d 537, at 539 (C.A. 2), certiorari denied, 340 U.S. 810; Sun Insurance Office. Ltd. v. Be-Mac Transport Co., 132 F.2d 535, 536 (C.A. 8); Kuhn v. Princess Lida of Thurn & Taxis, 119 F.2d 704 (C.A. 3); Knapp v. Imperial Oil & Gas Products Co., 130 F.2d 1, 3 (C.A. 4).



inferences are, we submit, clearly the only correct ones, no useful purpose would be served by remanding the case to the district court for further "findings."

CONCLUSION

The majority decision of the Court should be affirmed in all respects.

Respectfully submitted.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
WILLIAM W. WATSON,
Attorney,
United States Department of Labor,
Washington 25, D. C.

KENNETH C. ROBERTSON,
Regional Attorney.

JANUARY 1956.

...the ... of ...
...the ... of ...
...the ... of ...

...

...

...

...

...

IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES P. MITCHELL, SECRETARY OR
LABOR, UNITED STATES DEPARTMENT
OF LABOR,

Appellant,

vs.

HAROLD S. ANDERSON, JR., et al

Appellees.

No. 14327

SUPPLEMENTAL BRIEF

GIBSON, DUNN & CRUTCHER,
WILLIAM FRENCH SMITH,
JAMES J. RYAN,

634 South Spring Street
Los Angeles 14, California,

Attorneys for Appellees.

FILED

JUN 10 1955

PAUL H. O'BRIEN, CLERK

I

The effect of the 1949 amendment to Section 3(j)
of the Fair Labor Standards Act, as amended,
upon the principle announced in Consolidated
Timber Co. v. Womack(1942) 132 F. 2d 101

1

II

The retail or service exemption

15

A) The Proper Construction of
Section 13(a)(2) of the Act
defining a retail establishment

15

B) Whether the case should be re-
manded to the District Court
for findings

23

TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
Bruman, et al v. Lenkin Construction Co., et al, 149 F. 2d 827	25
Consolidated Timber Co. v. Womack, 132 F. 2d 101	1
Flotations Systems v. U. S., 136 F. 2d 483	27
Goodacre v. Panagopoulos, 110 F. 2d 716	27
Hazeltine Research, Inc. v. General Motors Corporation, 170 F. 2d 6, 10. cert. den., 336 U.S. 938, 93 L. Ed. 1097	26
Hurwitz v. Hurwitz, 136 F. 2d 796	26, 27
Juarez v. Kennecott Copper Corp., 225 F. 2d 100	12
Juarez v. Kennecott Copper Corp., 12 WH Cases 607	13
Knapp v. Imperial Oil and Gas Products Co. 130 F. 2d 1	27
Life Savers Corp. v. Curtiss Candy Co., 182 F. 2d 4	27
McComb v. Factory Stores Co., 81 F. Supp. 403	1, 3
McLeod v. Threlkeld, 319 U. S. 491, 87 L. Ed. 1538	14
Sbiacca-Del Mac v. Milius Shoe Co., 145 F. 2d, 389	25, 26
Shellman v. Shellman, et al, 95 F. 2d, 108	27
Woodruff v. Heiser, 150 F. 2d 873	27

<u>Miscellaneous</u>	<u>Page</u>
95 Congressional Record pp. 11216-11217	5, 6
95 Congressional Record, p. 12501	22
95 Congressional Record, p. 14928, 14929	4, 8
95 Congressional Record, p. 14936	7, 12
95 Congressional Record, pp. 14939-14940	7, 8
House Report No. 1453, 81st Cong., 1st Sess. Oct. 17, 1949	17, 18, 19

Regulations

29 Code of Federal Regulations, Chap. V, §776.17	11
--	----

Statutes

Fair Labor Standards Act, Sec. 13(a)(2)	16, 20, 22
---	------------

Pursuant to the Order of this Court dated December 11, 1955, we are filing this Supplemental Brief directed to the three points referred to in that Order.

I

THE EFFECT OF THE 1949 AMENDMENT
TO SECTION 3(j) OF THE FAIR LABOR
STANDARDS ACT, AS AMENDED, UPON
THE PRINCIPLE ANNOUNCED IN CON-
SOLIDATED TIMBER CO. vs. WOMACK
(1942) 132 F. 2d 101

We believe that a consideration of the 1949 amendment to Section 3(j) (29 U.S.C.A., Sec. 203(j)) and the history which led to that amendment requires the conclusion that the principle of the Womack decision has been substantially qualified as applied to the facts in this case. The intent of Congress in amending that section is unusually clear. Illustrative of the intent is the history of the case of McComb v. Factory Stores Co., 81 F. Supp. 403 decided under Section 3(j) prior to its amendment when "necessary" rather than "closely related and directly essential" was the test.

The factual similarities between the Factory Stores Co. case and the instant case are striking:

1) As here, it involved an action by the Department of Labor for an injunction. The defendant operated facilities very similar to those involved here for the Republic Steel Corporation and for other companies.

The facility was located in the Republic Steel plant and provided eating facilities for production workers (81 F. Supp. 403, 405).

2) The facilities were operated under a written agreement very similar to that involved in the instant case. The agreement contained most of the items considered significant by this Court on Page 2 of its Opinion (81 F. Supp. 403-4).

3) The employees were not even permitted to leave the plant and were therefore required to eat at the facility unless they saw fit to bring their own lunch or utilized a few lunch wagons (81 F. Supp. 405).

4) Even if the employees could have left the plant "The location of the plant. . . makes it impractical for the men to eat at outside restaurants" and "it would be difficult if not impossible with the available transportation facilities" for them to do so (81 F. Supp. 405).

5) The issue involved was whether the Act covered persons employed by an industrial eating facility similar to that involved in the instant case.

There is therefore in the factual situation of the Factory Stores Co. case every significant element relied upon by the majority opinion in the instant case. The "isolation", to the extent that that concept is relevant here, was more complete than is true in the

instant case. The necessity that the employees utilize the eating facilities was a chief factor upon which the decision in that case was based. The employees there had to use the defendant's facilities not only because of location and the lack of available transportation, but also because of plant regulations.

The trial court in the Factory Stores Co. case held that under such circumstances the feeding of employees was necessary to the production of goods for commerce. While this case was pending on appeal before the Sixth Circuit Court of Appeals, it was brought under criticism in Congress and was the subject of much comment there. The decision was in effect repealed by the 1949 amendment. The legislative history of the amendment clearly shows an intent to specifically reverse the decision of the trial court. This result was recognized by the Sixth Circuit Court of Appeals which remanded it to the Federal District Court where it was dismissed.

McComb v. Factory Stores Co. (6th Cir., 1948),
81 F. Supp. 403

The criticisms and consequent expression of intent of Congress concerning the case is very clear from the following excerpts from the legislative history of the 1949 amendment to Section 3(j). In establishing

gress rejected the "necessary" test and the manner in which it had been interpreted. The House Manager's Statement on the bill resulting from the Senate-House Conference and later enacted into law by signature of the President on October 26, 1949, states in part as follows:

"Coverage of the act has also been extended to employees of an independently owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F. Supp. 403 (N.D. Ohio, 1948)).

"Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and a more direct relationship to the producing, manufacturing, etc., activity than was true in the above cited cases. . . ."

* * *

"The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:

* * *

"All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating or other living facilities for factory workers, are quite clearly not performing any activities that are closely related or directly essential to the production of goods."

95 Cong. Rec. 14928, 14929

* * *

Mr. Lucas in his statement concerning the proposed change in Section 3(j) establishing the coverage test, said:

"Nor could the Administrator hold the act applicable as he has in the past to the following:

"(e) Employees of an independent cafeteria or canteen located in a factory which produces goods for interstate commerce, the cafeteria serving the employees of the factory - McComb v. Factory Stores Co. (81 F. Supp. 403)."

95 Cong. Rec. 11216

Numerous other quotations appear on pp. 17 to 24 of the Reply Brief of Appellees and in the Appendix thereto.

That it was definitely the intent of Congress to change the test of coverage as it had been established under the term "necessary" in Section 3(j) of the Act, is shown by the specific rejection of an amendment which would have continued the test as it had been interpreted prior to the amendment.

"The clerk read as follows:

"Amendment offered by Mr. Javits: On Page 4, line 21, strike out the words 'in any closely related process or occupation indispensable to the production thereof, in any State.' and insert 'or in any process or occupation necessary to the production thereof, in any State.'"

* * *

Mr. McConnell. The whole idea we have opposed here is the theory of bringing in certain types of people who were never intended to be brought in when this act was written. This is an effort to clarify that. Do you consider window cleaners to be in interstate commerce?

"Mr. Javits. When employees are working for a company that is engaged in interstate commerce and their work is necessary to that commerce, they should be covered by the act. Please note that I am seeking only to continue existing law by my amendment."
(Emphasis added)

* * *

"All I am trying to do by my amendment is to restore the language of the act which has been thoroughly interpreted."

* * *

"... the tellers reported there were - ayes 91, noes 133.

"So the amendment was rejected." (Emphasis added)
(95 Cong. Rec. 11216-11217.)

The amendment to Section 3(j) which was the subject matter of the foregoing legislative history accomplished the substitution of "closely related" and "directly essential" to production test for the "necessary" test. This change was one of substance and not one of mere form as the extensive legislative history concerning this amendment conclusively shows. It is abundantly clear that the framers of this legislation specifically recognized that the word "necessary" had been too broadly interpreted by the Administrator and that it was the intention of Congress through the use of the words "directly essential" and "closely related" to institute

a decidedly more severe test of coverage of the Act. Mr. McConnell, one of the House Managers of the Bill, in reporting it to the House stated:

"For instance, Congress, when it passed the act in 1938, thought that the word 'necessary', was a clear indication of intent. But, while it seems clear enough on the surface, nevertheless the Administrator and, later, the court decisions, have been expanding it beyond what was the original intent of Congress."

95 Cong. Rec. 14936.

Mr. Lucas, also a member of the House, expressed the intention of Congress, which appears throughout the legislative history, to abolish the 'necessary to production' theory as developed by the Administrator and the courts.

"As to 'indispensable' and 'directly essential', which caused some concern to many of my fellow Members, I stand for 'indispensable.' I think it is a word that will not need much litigation in order to define it, and I felt that when the House adopted such a word that it made clear its desire that the Administrator should not use the 'necessary-to-production' theory in order to go out and cover people under this act who were not originally intended to be covered by the Congress which enacted the first law. But, 'directly essential' connotes 'indispensable'. I do not mean to say that they mean the same thing, or that they do not mean the same thing, but I believe that those words will state unequivocally to the Administrator that, 'You shall not use this act to carry the coverage of the law out into the fields which are foreign to the intent of Congress'. So I believe that 'directly essential' may answer our purpose.

"I am extremely gratified that the conferees in their report used examples and cases in explaining 'directly essential', which I used in my argument during General debate on this bill, for 'indispensable'. So I think that our intent is very closely allied." *

95 Cong. Rec. 14939-14940

We urge that such a clear indication of legislative intent, together with the mere fact of the amendment to Section 3(j) itself, demonstrates that there was no congressional intent to cover the activities of Appellees here. A contrary finding would be to adopt the original decision in the Factory Stores Co. case, the very result which Congress specifically overruled in its consideration of that case.

The Court's decision in the instant case is directly contrary to this intent. Instead of recognizing the distinction which not only was, but must have been intended by a change in the wording of Section 3(j), the present decision equates "necessary" with "closely related and directly essential", making the amendment nothing more than a useless act. Indeed, the tests stated by the Court, namely one of "substantial need" and whether the facilities were needed, may be even of

* The examples and cases included the McComb v. Factory Stores Co. situation, 95 Cong. Rec. 14928-9.

lesser degree than "necessary". In any case, they do not constitute the statutory test of closely related and directly essential.

Furthermore, in applying the Womack principle rather than the test provided by Section 3(j), as amended, the Court has rejected the specific findings of fact of the trial court. The findings of fact were based upon stipulated and uncontradicted evidence. Such a result, therefore, is without justification in the law or appellate procedures. This Court in applying the Womack principle states:

"However, in each instance the facility furnished was without a question needed, and without it the production would have been affected."

(Page 4 of the Opinion)

But the findings of fact among other things state:

"In the event that the sales and services provided by defendants at their Darwin operation should be curtailed or abandoned entirely there would be only a temporary inconvenience to the operation of the mine; the effect upon production at the mine would be unsubstantial even during this temporary period. There would be no significant effect upon total shipments from the mine, particularly in view of stocks of ore that are kept in reserve. During the period of a recent strike threat some 20 to 25 employees terminated their employment. Shipments from the mine were not affected as a result thereof."

(Finding of Fact No. 19 (Tr. 68-69))

In addition, such findings show, among other things, that only 20 to 25% of the employees of Anaconda

utilized Appellees' facilities at all (Tr. 55), that numerous facilities were available elsewhere which the stipulated and uncontradicted evidence shows were not only regularly used by Anaconda employees, but which were similar in distance and type to those regularly used by employees in mining areas throughout the West (Tr. 69-70), that almost one-half the number of employees using Appellees' facilities live in Lone Pine and communities away from the mine and commute regularly, that school children daily attend school in Lone Pine, that fifty per cent of the employees who live at Appellees' facilities own their own automobiles and the remaining employees ride with them when there is a need or occasion for transportation (Tr. 58-59), that all of the communities involved are connected by paved two-lane highways open all year (Tr. 58-63), that on several occasions similar facilities, under similar circumstances, at other mines have been destroyed or discontinued without affecting production, that at some mines no such facilities exist at all (Tr. 69-71), and that Appellees' facilities are not remote and isolated to the extent that they are removed from ordinary business competition (Tr. 69).

This is quite a different situation from Womack.

To apply the principle of that case is to reject the

specific findings of the trial court. If accepted as we believe they must be, they clearly do not show activities closely related to or directly essential to the production of goods for commerce.

Furthermore, the test established by Congress in amending Section 3(j) requires that in order to be covered, the activity must be part of a closely related process and directly essential to the production of goods for commerce.

The Administrator himself has held that, in addition to a finding concerning the "directly essential" nature of the employees' activities, a finding must also be made that such activities are part of a "closely related process." There is a definite and clear distinction between the two.

"The Amendments deleted the word 'necessary' and substituted the words 'closely related' and 'directly essential' contained in the present law. * * * Under the amended language, an employee is covered if the process or occupation in which he is employed in both 'closely related' and 'directly essential' to the production of goods for interstate or foreign commerce. (Emphasis added)

* * *

"Not all activities that are 'closely related' to production will be 'directly essential' to it, nor will all activities 'directly essential' to the production meet the 'closely related' test."

29 C. F. R. Ch. V, §776.17

It is clear from the Congressional history that the framers of the 1949 Amendments intended that for an employee to be covered he must be engaged in a process closely related to the production of goods for commerce. In debates in the House concerning the conference bill later enacted into law, Mr. McCornell, one of the House Managers, in reporting to the House on the conference bill stated as follows:

"First - and this is important - the coverage of the act for a large number of employees is dependent upon the definition of 'production of goods for commerce'. A substantial change has been made in this definition which will have the effect of preventing the Administrator and the courts from extending the coverage to occupations which are not closely related and directly essential to production." (95 Cong. Rec. 14936.) (Emphasis added)

The foregoing effect of the amendment to Section 3(j) has been recognized by the Tenth Circuit Court of Appeals in Juarez v. Kennecott Copper Corp. (1955) 225 F. 2d 100 decided on July 26, 1955. In the Juarez case, the mining company itself owned and operated a hospital located at the rim of an open pit mine in New Mexico. It was contended by plaintiff that the work of the employees of the hospital was so closely related to the production of goods for commerce and so essential thereto as to place them within the coverage of the Act.

In finding that the work of the employees in the hospital was not closely related or directly essential to the production of goods for commerce, the Court stated:

"Apparently no case involving employees of a company owned hospital has come before the courts. The cases nearest in point are those involving restaurant employees and cooks employed in feeding employees engaged in commerce or the production of goods for commerce. Appellants cite a number of cases in which such employees were held to be covered by the Act. Most of these cases arose prior to the amendment of Section 203(j) of the Act in 1949. By that amendment the word 'necessary' was dropped from the Act and the words 'in any closely related process' were added, making the section read 'or in any other manner working on such goods or in any closely related process or occupation directly essential to the production thereof, in any State.' We think it is clear from the legislative history that this amendment was to restrict coverage with respect to such employees. The conference report (H. R. Rep. No. 1453, 81st Cong. 1st Sess., Oct. 17, 1949, W.H.M. 6:507) states, "The courts have also held the act applicable to employees engaged in maintaining and repairing private homes and dwellings where such homes and dwellings are being leased by interstate producers to their employees. Coverage of the Act has also been extended to employees of an individually owned and operated restaurant located in a factory (McComb v. Factory Stores, 81 F. Supp. 403, 8 WH Cases 284 (N. D. Ohio) 1948)."

"Under the bill as agreed to in conference an employee will not be covered unless he is shown to have a closer and more direct relationship to the producing, manufacturing, etc., activity than was true in the above-cited cases." (Emphasis by the Court)

Juarez v. Kennecott Copper Corp., 12 WH Cases 607, 609

The pronouncement of the United States Supreme Court in McLeod v. Threlkeld, (1943) 319 U. S. 491, 87 L.Ed. 1538, decided long after the Womack decision, we believe to be significant as applied to the facts in this case:

"It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other.

McLeod v. Threlkeld, (1943) 319 U.S. 491, 497, 87 L. Ed. 1538, 1543-1544.

In that case the employees provided meals for maintenance-of-way employees of a railroad by means of a dining and kitchen car which was set at the place of work of the boarders wherever the right-of-way was being maintained. Because of the very nature of the work, the employees would have to utilize such facilities since on many if not most occasions no others would be available in the various desolate areas where this type of work had to be done.

For the foregoing reasons, we believe that the amendment to Section 3(j) of necessity affected the principle of the Womack case as applied to the instant

case. The activities involved here are not closely related and directly essential to the production of goods for commerce within the meaning of the words themselves or as Congress intended Section 3(j) to be applied.

II

THE RETAIL OR SERVICE EXEMPTION

A) The Proper Construction of Section 13(a)(2) of the Act Defining a Retail Establishment

The tests for determining what constitutes a retail or service establishment are entirely different from and independent of those determining whether an employee's activity is closely related or directly essential to the production of goods for commerce.

The test for determining whether the employees involved are covered by the Act is whether or not they were employed "on any closely related process or occupation directly essential to the production" of goods for commerce. In applying this test, factors such as remoteness, availability of other facilities and integration with the producer for commerce may be considered relevant.

But once it is decided that the employees are covered by the Act such factors are no longer material. It is then necessary to apply the tests specifically

enumerated in Section 13(a)(2) (29 U.S.C.A. 213(a)(2)) of the Act to determine whether or not the establishment employing such employees is a retail or service establishment as defined by that section. The activities of the employees are not controlling as in the case of the coverage question.

Section 13(a)(2) of the Act provides:

"Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to . . . (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; . . ."

This definition sets up three criteria which alone determine what constitutes a retail or service establishment:

- 1) Whether more than 50% of the establishment's annual dollar volume of sales of goods or services are made in California.
- 2) Whether 75% or more of the establishment's annual dollar volume of sales of goods or services, or both, are for resale.
- 3) Whether 75% or more of the establishment's

sales or services are recognized as retail sales or services in the particular industry.

The text of the House Manager's Statement reporting on the House-Senate conference bill which contained the 1949 amendments as enacted into law by signature of the President on October 26, 1949, is very relevant in explaining the requirements of Section 13(a)(2).

The following are pertinent excerpts:

"Exemptions

"General statement. - The House bill substantially revised Section 13(a)(2) of the Act relating to retail and service establishments. . . .

* * *

"Retail and service establishments. - Both the House bill and the Senate amendment contained an identical amendment providing for an exemption for retail and service establishments (Sec. 13(a)(2)). The amendment was continued in the conference agreement.

"The amendment (Sec. 13(a)(2)) agreed to in conference clarifies the existing exemption by defining the term 'retail or service establishment' and stating the conditions under which the exemption shall apply. This clarification is needed in order to obviate the sweeping ruling of the Administrator and the courts, that no sale of goods or services for business use is retail. See Roland Electrical Co. v. Walling (326 U.S. 657); McComb v. Diebert (E.D. Pa. 1949), 16 Labor Cases, Par. 64,982; McComb v. Factory Stores (81 F. Supp 403 (N. D. Ohio, 1948)).

"Under paragraph (2) of Section 13(a) as agreed to in conference, an establishment is an exempt retail or service establishment if it meets three tests:

"First, over 50 per cent of the establishment's sales by annual dollar volume of goods or services must be made within the state in which the establishment is located. The requirement that the greater part of the selling or servicing be in intrastate commerce, found in the present law, is eliminated because of the tendency of the courts to hold that many sales or services made or performed within a state are not intrastate sales or services. See Kirschbaum v. Walling (316 U. S. 517, 526); Boutell v. Walling (327 U. S. 463, 467). Under the new test, if the sales are made within the state in which the establishment is located, it is immaterial that the sales (a) are made pursuant to prior orders from customers, (b) contemplate the purchase of goods by the establishment from outside the state to fill customers' orders, or (c) are made to customers who are engaged in interstate commerce or in the production of goods for interstate commerce. In this connection, see Walling v. Jacksonville Paper Co. (317 U. S. 564).

"The second test provides that in order for an establishment to be exempt, not less than 75 per cent of its annual dollar volume of sales of goods or services (or both) must not be for resale. In other words, at least three-fourths of the goods or services (or both) sold must be to purchasers who do not buy for the purpose of reselling. Normally, goods are to be considered as sold for resale even though the purchaser sells them in an altered form. . . .

"The third test provides that 75 per cent of the establishment's annual dollar volume of sales of goods or services (or of both) must be recognized in the particular industry as retail sales or services. Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service.

"The location of the establishment, whether in an industrial plant, an office, building, railroad depot, or a Government park, etc., will make no

"difference in the application of the exemption.

So long as the establishment meets the tests described above, it will be excluded from the minimum wage and overtime provisions of the Act." (Emphasis added).

House Managers' Statement (House of Representatives Report No. 1453, 81st Cong., 1st Sess., Oct. 17, 1949; 95 Cong. Rec. 14931-14932, Oct. 18, 1949).

It will be noted again that the Factory Stores Co. decision which disposed of the retail exemption

issue as did the Court in the instant case, namely upon the same considerations as determined the coverage question, was overruled in this respect.

When the Womack case was decided, the tests applicable to the coverage and to the retail exemption questions were both very general although quite different even then. The 1949 amendments, however, establish specific criteria for determining the retail exemption question. These criteria are unrelated to those relevant to the coverage question.

Furthermore, in determining whether the retail or service exemption applies it is the nature of the employer's business and not the character of the employee's activities which is controlling. Whether the employer's business constitutes a retail or service establishment is determined only by the application of the three tests specified in Section 13(a)(2).

To review the record on this issue:

The first two criteria set up by Section

13(a)(2) were established by stipulation and incorporated in the Findings of Fact as follows:

"All of defendants' annual dollar gross income at their Darwin operation results from the furnishing of goods and services within the State of California.

"All of the meals served, goods sold or lodging furnished by defendants at their Darwin operation are to persons who consume such meals or goods or utilize such services in the Anaconda area and within the State of California." (Tr. 29, 73.)

Indeed over 75% of the total annual dollar volume results from the dining and commissary operations alone (Tr. 64-65).

It was therefore only necessary to establish the third requirement, namely, that 75% or more of the annual dollar volume of sales of goods or services were recognized as retail sales or services in the particular industry. This was established by substantial, uncontradicted evidence, indeed the only evidence which was available, as follows:

a) Testimony and documents establish that the United States Bureau of Census in its 1948 Census of Business and its proposed 1953 Census of Business placed Appellees' type of activity in the category of a retail

trade (Tr. 152-153; Def.-App. Ex. F.).

b) Testimony and documents were introduced to show that the United States Office of Price Administration during the period of its existence, included Appellees' type of establishment in its survey and compilation of statistics concerning the restaurant industry (Tr. 153-154; Def.-App. Ex. G).

c) The testimony of the Secretary and General Counsel of the National Restaurant Association who testified, among other things, that Appellees were members of that Association; that the term 'retail sale or service' has a recognized meaning in the restaurant industry; that such term is defined as the sale or service of a meal to the consumer generally consumed on the premises of the establishment; that Appellees' sales and services are included within this definition and are recognized and known as retail sales and services in and by the restaurant industry; that the type of establishment operated by Appellees was part of the restaurant industry and participates in the activities of the Association in the same manner as its other types of operations; that Appellees' and similar operations are treated as part of the restaurant industry for the purposes of publications, conventions and other activities. Various documents were

introduced as further proof of the foregoing (Tr. 148-154; Def.-App. Exs. A to E, incl.).

That this is most relevant testimony is shown by the Congressional history of the 1949 amendments. Senator Holland, who was the sponsor in the Senate of the amendment to Section 13(a)(2), which was later enacted into law, said in debate on the amendment concerning the practice of a trade association:

"Mr. Douglas: Its interpretation would be very persuasive, would it not, even if not controlling?"

"Mr. Holland: Yes, it would be quite persuasive." (95 Cong. Rec. p. 12501.)

d) It was stipulated that the Secretary of the Southern California Restaurant Association would testify substantially the same with respect to the Southern California area (Tr. 150, 160-161; Def.-App. Ex. H).

The evidence shows that the trade associations of which Appellees are a part both national and state, the United States Census Bureau, and the United States Office of Price Administration during its existence, all recognized that Appellees' sales and services are retail sales or services in the industry of which Appellees are a part.

Appellant did not introduce a single item of evidence to rebut this proof.

In order to show that the retail or service exemption applied, it was necessary for Appellee to show only the existence of three specified criteria. Two were established by stipulation and the third by substantial and uncontradicted evidence, a substantial part of which was documentary and which alone establishes such criterion.

The criteria to determine whether the exemption applies are specific. In this case each of the three requirements are fully established, two by stipulation and the third by stipulated and uncontradicted evidence. Even assuming coverage, therefore, Appellees are exempt as a retail establishment.

B)Whether the Case Should be Remanded to
the District Court for Findings

We urged in our brief filed with this Court that in the event the Court should find coverage, it could then consider the application of Section 13(a)(2) upon the basis of the present record without the necessity for remanding the case to the District Court for findings on this question with the consequent time and expense to the parties involved (Brief for Appellees, p. 58-59).

We believe that the Court may determine this question on the basis of the present record for the

following reasons. *

First, two of the three criteria determinative of the retail exemption question are stipulated. The third is established by uncontradicted evidence, a substantial part of which is documentary (Appellees' Exhibits A-H inclusive). The foundation for each of these exhibits was stipulated (Tr. 149, 151). The documentary evidence considered alone establishes the third criterion.

Second, Judge Carter's decision was based in part upon the fact that Appellees' operation was a retail and service establishment under Section 13(a)(2), even though he made no specific findings on this issue because he felt they were unnecessary in view of his determination of the coverage question.

"The Court: I would hold, also, that it is a retail establishment within the exemption. I would base my decision on both grounds." (Tr. 165)

There is no disputed issue of fact. The evidence is entirely stipulated or uncontradicted. It would be necessary to have findings only in the event

*In both the Answer and in the Pretrial Stipulation and Order the issues concerning the application of the exemptions under Sections 13(a)(2) and 13(a)(1) were raised. The parties proceeded to trial on the basis of all three issues (Tr. 30-31, 83, 148-161).

that a question of credibility should exist. Such a question does not exist because the third criterion was not only established by testimony, but also by documents, the foundation for which was stipulated. Furthermore, since Judge Carter based his decision in part on the retail and service exemption, there can be no question of credibility. He of necessity accepted the evidence as establishing the third criterion. We feel that this Court can as well determine the retail exemption issue upon the present record as if the Trial Court had made findings.

Under these circumstances we believe the principle to be well established that the appellate court may decide the issue.

"We have carefully read and considered the entire record, and while we think it is always desirable, on a trial to a judge without a jury, that the facts should be found to aid us in understanding the basis of the decision, we are nevertheless of opinion that here the record considered as a whole does not present a genuine issue as to any material fact - in view of which it would be both a waste of time and a needless expense to send the case back to the District Court for special findings of fact."

Burman, et al v. Lenkin Construction Co., et al
(D. C. Cir. 1945) 149 F. 2d 827, 828

"The trial court made no findings of fact nor conclusions of law, as required by Rule 52(a) of the Rules of Civil Procedure, upon the defenses of

"ouster and waiver. Since the facts relied upon to support these two defenses are in the record and undisputed we shall not remand the case for this reason alone but will in the exercise of our jurisdiction under such circumstances consider and determine them. See Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316, 60 S.Ct. 577, 84 L. Ed. 774; Helfer v. Corona Products, 8 Cir., 127 F. 2d 612; Knapp v. Imperial Oil & Gas Products Co., 4 Cir., 130 F. 2d 1, 3; Hurwitz v. Hurwitz, 78 U. S. App. D.C. 66, 136 F. 2d 796; Brown v. Quinlan, Inc. 7 Cir., 138 F. 2d 228, 229; Bowles v. Russell Packing Co., 7 Cir., 140 F. 2d 354.

* * *

"The trial court made no findings of fact nor conclusions of law relating to the defense of a special agreement. Doubtless such a finding was deemed unnecessary in view of the finding of nonuse. Since the evidence upon this issue is not in conflict and the proper inferences to be drawn therefrom only are in dispute, we shall examine the questions presented."

Sbioca-Del Mac v. Millius Shoe Co. (Eighth Cir. 1974) 145 F. 2d 389, 400, 402

"The fact that the district judge made no findings and announced no conclusions upon this issue, does not require remand, since the record is complete. Muncie Gear Co. v. Outboard Marine Manufacturing Co., 315 U. S. 759, 766, 768, 62 S. Ct. 865, 86 L. Ed. 1171"

Hazeltine Research, Inc. v. General Motors Corporation (Sixth Cir. 1948) 170 F. 2d 6, 10. cert. den., 336 U.S. 938, 93 L. Ed. 1097

"The duty of the trial court to make findings of fact should be strictly followed. But such findings are not a jurisdictional requirement of appeal which this court may not waive. Their purpose is to aid appellate courts in reviewing the decision below. In cases where the record is so

"clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular case. That is the situation here."

Hurwitz v. Hurwitz (D.C. Cir. 1943) 136 F. 2d 796, 799

See also:

Goodacre v. Panagopoulos (D. C. Cir. 1940)
110 F. 2d 716, 718

Life Savers Corp. v. Curtiss Candy Co.
(Seventh Cir. 1950), 182 F. 2d 4, 7

Knapp v. Imperial Oil and Gas Products Co.
(Fourth Cir. 1942), 130 F. 2d 1, 3

Woodruff v. Heiser (Tenth Cir. 1945) 150 F. 2d 873, 875

This Court has similarly applied

this principle. See Flotation Systems v. U. S. (Ninth Cir. 1943) 136 F. 2d 483, 484.

Furthermore:

"The trial court made no findings of fact as required by Equity Rule 70-1/2 of Supreme Court, 28 U.S.C.A. following Section 723. In the absence of statute or rule compelling specific findings of fact, the decree in cases where no findings of fact were made has been regarded as impliedly a finding of all the facts sufficient to support the decree which could have been found from the pleadings and the proof."

Shellman v. Shellman, et al (D.C. Cir. 1938)
95 F. 2d, 108, 109

We believe therefore that the record is clear and complete on the exemption question, so much so that

findings would serve little purpose. There are no disputed issues of fact. All relevant facts are established either by stipulation or by uncontradicted evidence including documents the foundation of which is stipulated. Judge Carter based his decision in part upon a finding that Appellees' facility was a retail establishment, thereby necessarily finding from such evidence that the three criteria of Section 13(a)(2) were established.

DATED: January 13, 1956

Respectfully submitted,

GIBSON, DUNN & CRUTCHER
WILLIAM FRENCH SMITH
JAMES J. RYAN,

By s/ William French Smith
William French Smith

Attorneys for Appellees.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA }
County of Los Angeles } ss.

Lucille Kraemer, being first duly sworn, says:
That affiant is a citizen of the United States and a
resident of the County of Los Angeles; that affiant
is over the age of eighteen years and is not a party
to the within and above entitled action; that affiant's
business address is 634 South Spring Street, Los Angeles,
in said County and State; that on the 13th day
of January, 1956, affiant served a copy of Supplemental
Brief on appellant, James P. Mitchell, Secretary of
Labor, United States Department of Labor, by placing a
true copy thereof in an envelope addressed to the
respective attorneys at the address of said attorneys
as follows:

Stuart Rothman, Solicitor
Bessie Margolin, Chief of Appellate
Litigation
William W. Watson, Attorney
Kenneth C. Robertson, Regional Attorney
United States Department of Labor
Washington 25, D. C.

and by then sealing said envelope and depositing the same,
with postage thereon fully prepaid, in the United States
mail at Los Angeles, California; that there is regular

communication by mail between the place of mailing and
the place so addressed.

s/ Lucille Kraemer
Lucille Kraemer

Subscribed and sworn to before me
this 13th day of January, 1956.

s/ Irene H. Jones
Notary Public in and for the County
of Los Angeles, State of California.

My Commission Expires Sept. 29, 1958.

(SEAL)



United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA ; and CARROLL, HEDLUND &
ASSOCIATES, INC., a Washington Corporation,
Appellants,

vs.

RICHARD E. DOOLEY, and JEAN DOOLEY, his wife,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLEES' BRIEF

R. P. GUIMONT
Attorney for Appellees

1702 Smith Tower
Seattle 4, Washington

THE ARGUS PRESS, SEATTLE

FILED

OCT 11 1954

PAUL P. O'BRIEN
CLERK

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA ; and CARROLL, HEDLUND &
ASSOCIATES, INC., a Washington Corporation,
Appellants,

vs.

RICHARD E. DOOLEY, and JEAN DOOLEY, his wife,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLEES' BRIEF

R. P. GUIMONT
Attorney for Appellees

1702 Smith Tower
Seattle 4, Washington

INDEX

	<i>Page</i>
I. Statement of the Case.....	1
II. Summary of Argument.....	2
III. Argument	2
IV. Conclusion	15

TABLE OF CASES

<i>Anderson v. Reeder</i> , 42 Wn.(2d) 45, 48.....	11
<i>Andrews v. McCutcheon</i> , 17 Wn.(2d) 340, 345-346....	12
<i>Leuch v. Dessert</i> , 137 Wash. 293, 295, 296.....	12
<i>Seattle v. Puget Sound Improvement Co.</i> , 47 Wash. 22, 91 Pac. 255, 125 Am. St. 884, 12 L.R.A.(N.S.) 949	13

TEXTBOOKS

32 Am. Jur., Landlord and Tenant—	
Sec. 688, pp. 561-563	8
Sec. 694, p. 571	8

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA; and CARROLL, HEDLUND & ASSOCIATES, INC., a Wash- ington Corporation,	<i>Appellants,</i>	} No. 14390
vs.		
RICHARD E. DOOLEY, and JEAN DOOLEY, his wife,	<i>Appellees.</i>	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

APPELLEES' BRIEF

I. STATEMENT OF THE CASE

The appellees agree that the statement of the case as set forth by the appellants is a correct statement of the facts of the case as far as appellants have stated it. But, in addition thereto, the facts show appellants had notice, through their resident manager, that the wire fences were a menace on the project (R. 254). Appellants knew through their maintenance superintendent that fences on the project were destroyed during the day and required daily fence repairs and that it was a dangerous condition that would develop from the disrepair of the fences. It would be dangerous to an individual traveling there (R. 277, 278). The same witness had occasion frequently to repair the fence wire on casual walks through the area, sometimes once a

week and sometimes several times a week, in different areas of the project (R. 278); said fences would be down anytime between 8:00 A.M. and 4:30 P.M.; and said fences would curl across the sidewalks (R. 278). Other employees had similar notice of the fences being down in different parts of the project and such disrepair was so continuous that a constant daily repair program was in effect (R. 212, 230, 241, 261, 262).

On the basis of all the testimony pertaining to the facts adduced at the trial, the court made findings of fact shown in Paragraphs VI and VIII thereof (R. 13, 14) which are amply supported by the evidence and which findings warrant a recovery on the part of the appellees herein.

II. SUMMARY OF ARGUMENT

The appellants had constructive notice of the dangerous condition of the premises brought about by the defective wire barricade erected by appellants.

III. ARGUMENT

We agree with the appellants that in order to impose liability for injury to an invitee upon real property by reason of failure to maintain the premises in a reasonably safe condition, the owner or occupant must have actual or constructive notice of the dangerous condition.

By way of argument concerning the constructive knowledge which the appellants had of the defective condition of the wire barricade and the premises generally which were under their control, attention must be called to the testimony upon which the court made

its findings of fact. To do this it is mandatory to call the court's attention to the testimony of the various witnesses as set forth in the transcript of the record.

The mother of appellee Jean Dooley on several occasions saw the wire down and dangling in the corner of the walk in September and October, 1952, at the point where appellee fell, prior to the day her daughter fell on November 5, 1952 (R. 62, 63).

Yvonne Hart, one week prior to Mrs. Dooley's injury, visited the Dooleys, and she testified that the stakes and wires were laying across the sidewalk at the point where appellee fell (R. 90, 91).

Mrs. Dooley's husband testified the wire wasn't in very good condition prior to November 5, 1952, at the point his wife fell, and that at various times the wire was laying on the sidewalk or a stake was pulled up or knocked over (R. 99). Likewise, he testified to having seen the workers for the appellants straightening wires or putting back stakes (R. 100). He further testified that he did not think the light was adequate to cover the sidewalk where the accident occurred (R. 105). He testified that floodlights could light the sidewalk but would not light the wire (R. 108).

Jean Dooley testified to walking down the middle of the sidewalk at night and at the corner where she fell there was a wire in her path (R. 145). She testified she did not see the wire, and did see a loose wire after she had fallen in the middle of the sidewalk (R. 149).

Nickolas Cvetikovs, night watchman and utility maintenance man, testified that he worked on November 5, 1952, and worked from 6:00 P.M. every night (R.

205); that his duties with respect to the fences which were constructed around the lawn areas were whenever he was around if he saw a fence which was not in order he put the wire aside or fixed it as well as he could; he would just put it in order to "prevent disaster" (R. 208). He testified that whenever he made his round and he found the barricades down he either put them away "on" the sidewalk or just repaired as far as he could with his pair of pliers (R. 212). He testified that on occasions during the fall of 1952 and prior to November 5, 1952, he sometimes set aside barricades that had fallen down or were loose (R. 212). The same witness testified to having picked up wires that had fallen across the sidewalk in the general area where Mrs. Dooley fell a couple of times, maybe more (R. 215).

George Yamada, the maintenance gardener at Lake Burien Heights, employed by Carroll, Hedlund & Associates, Inc., testified that children would at times go out and cut the fences, cut the wires, or swing on the fences and loosen them (R. 234), and he saw barricades down in travelling about the grounds and that it was once or twice a week that he observed that, and that he himself went out and made repairs to the fences (R. 230). He further testified that everyone had a standing order to remove barricades that had fallen onto the sidewalks (R. 233), and that it was customary to place cloth markers hanging from the wire to make the wires more visible (R. 235, 236), and that in attaching cloth ribbons to the barricade wire it made the wires more safe (R. 237).

Oscar F. Hansen, of the landscape gardening firm,

testified that the lawn areas were planted in April, May and June and part of July of 1952 (R. 239) and that his firm put up the barricades around the newly-planted area (R. 240) and that he detailed one or two men to fix the fences and that he usually made the rounds in the afternoon to see if everything was okay for the night (R. 241). He testified that they did use a coarse twine to mark the wires, but the children tore them down and they finally gave up marking them (R. 243). He testified that wires were not down everyday but most of the time (R. 243).

James Brydon, the resident manager of the project, testified that he delegated one man every morning to make the rounds of the project, fixing fences and that the outside working crew worked from 8:00 A.M. to 12:00 noon and from 12:30 P.M. to 4:30 P.M. (R. 253). He testified further that all outside crews had been given orders that anything out of the ordinary seen outside of their immediate work that was wrong was to be reported to the office or to the superintendent; that would mean fences or anything of that kind that was a "menace" to the project (R. 254). He testified to having had quite a few reports of fences being down (R. 261). He testified that complaints had come in at night concerning wires and that it was the sole duty of a man to inspect the wires beginning at 8:00 A.M. in the morning until he could get the job done and that sometimes it took the man an hour or two hours or all day, and that it would take all day sometimes because a lot of wires were down (R. 262).

The maintenance superintendent, Clarence Suder, testified that daily fence repairs were necessitated be-

cause children and adults both destroyed the fences to some extent during the day or during the twenty-four hours of the day (R. 277). He further testified that he had occasion frequently to make repairs to the fence wire, sometimes once a week, sometimes several times a week and that said occasions would be precipitated upon a casual walk through the area which he himself would make, and that would occur anytime between 8:00 A.M. and 4:30 P.M.; and that at anytime he would be walking through the project he was apt to run into a broken down wire fence and that sometimes the wire would be curled across the sidewalk; that they seldom were ever straightened (R. 278). He testified that he frequently made an inspection tour throughout the area after the children went into their apartments or retired and towards evening, and that occasionally he found defects at that hour of the day (R. 279).

Clayton Dykeman, an employee of Lake Burien Heights Housing Project, testified that he was assigned to inspect the entire fencing every day and he started at 8:00 A.M. when he started work; that some days it would take maybe an hour and other days it was somewhere near the whole day (R. 281). He recalled having mended the wire at the point where appellee fell (R. 285), and that he repaired it everyday when it was down when he went around that area (R. 286). He testified that he had originally tied twine to the wire to act as a warning when he first performed his duties and that he thought it was very necessary until they got adjusted to the fence. He further testified he didn't believe the tenants had become entirely adjusted to the fences up until the time he left the project (R. 287). He testified

he left the project on November 15, 1952 (R. 281). He further testified there were times that the wires were drawn across the sidewalk (R. 287).

Marion S. Wilson, the office manager for the project, testified to occasionally receiving complaints from the tenants with respect to the wires being down and to having observed the fences down on one or two occasions (R. 293).

From the foregoing testimony it would seem quite clear that the appellants had actual knowledge that generally the wires throughout the project were down on many, many occasions and that they were a menace and a danger to the tenants and appellants would certainly be chargeable with constructive notice that the wires were apt to be down at any time, day or night, and be a danger to users of the walks.

On the basis of this testimony, is it any wonder that Judge Bowen in his decision and in the findings of fact found that the appellants were negligent in their failure to maintain the wire barricade in a reasonably safe condition and in permitting said wire to remain on the sidewalk where appellants knew, or in the exercise of reasonable care, should have known that the tenants of said apartments walked and in the darkness would be subject to danger; that they were negligent in failing to remove the hidden danger caused by the wire being permitted to remain on the sidewalk in a place where tenants of said apartment would be in the habit of walking, after having knowledge, or in the exercise of reasonable care, should have had knowledge that said dangerous obstruction existed upon said sidewalk?

Is it any wonder that he also found that the sidewalk was under the supervision of the appellants and that the appellee, Jean Dooley, tripped over a wire which was disarranged from a wire barricade which had been erected by appellants to keep pedestrians from walking on the newly-planted lawns and which wire had become broken down in places and had curled up and was permitted by appellants to obstruct the sidewalk in a place in which appellants knew that appellee would customarily and necessarily walk; that as a result of appellants' negligence in maintaining the wire barricade, the plaintiff tripped and fell over said wire and fell violently to the ground?

The law is quite clear and counsel for appellants have cited throughout their brief the law which is generally controlling. These principles are broadly stated in 32 Am. Jur., Landlord and Tenant, Sec. 688, pp. 561-563:

“It is generally held that where the owner of premises leases parts thereof to different tenants and expressly or impliedly reserves other parts thereof, such as entrances, halls, stairways, porches, walks, etc., for the common use of different tenants, it is his duty to exercise reasonable care to keep safe such parts of which he so reserves control, and if he is negligent in this regard, and a personal injury results by reason thereof to a tenant or to a person there in the right of the tenant, he is liable, provided the injury occurs while such part of the premises is being used in the manner intended * * *.”

and, Sec. 694, p. 571:

“Actual or constructive knowledge on the part of the landlord of the defect causing the injury is necessary to render the landlord liable. It is gener-

ally held that to recover for injury received from the defective condition, the burden is on the tenant injured to show that the landlord knew of the defect or by the exercise of reasonable care would have known of it. The negligence of a landlord in regard to the safety of the approaches to the leased premises, and the halls and stairways therein, used by different tenants, is based upon his failure to use ordinary care to keep such portions of the premises in a reasonably safe condition after having notice or knowledge, actual or constructive, of defects therein. It must be shown either that the landlord had knowledge of the defect or that it had been in an unsafe condition for such a length of time that the landlord should have known of it. The question as to the length of time a defect must exist in order that the owner may be charged with notice or knowledge thereof depends very largely upon the nature of the defect and the facts of the particular case * * *."

We submit that the landlord in the instant case, by its agents, knew of the "menace" created by the defective wiring in the barricades and knew that "disaster" might result to the users of the walk. Appellants knew for months of the dangerous condition of the premises and exercised a maintenance program which they felt was sufficient to protect themselves from liability, acknowledging, however, that the condition was not controlled during the darkness; and it also must be acknowledged that the condition was more dangerous in the darkness of night time than in the day time. Yet their program for inspection was not in effect in the night time. When they knew that every morning fences would be found down, it would appear that they should

have taken some precaution to have erected a barricade that was not so faulty and that would not cause injury to others, which they knew the wire barricade would do.

The expense of a wooden fencing would certainly be far less than the wages paid daily to an inspector to repair the fence which they used as a barricade. It would be far more inexpensive to erect a suitable barricade which would cause no one any damage or injury and would be suitable for the purposes intended, namely—to protect the lawns and not cause damage to users of the sidewalks. A barricade of 2x2's placed on 2x2 stakes surrounding the lawn areas would be almost as inexpensive to erect as the wire barricades and certainly the children would not have been able to cut those and break them down as the landlord claims they did with the wire barricades. It would just seem reasonable to require appellants to erect a suitable, safe barricade, than to have the appellants erect an unsuitable, dangerous barricade as they did—a barricade which was much more expensive to maintain than it would have cost to erect a safe barricade in the original instance.

Counsel for appellants are attempting to excuse appellants for negligence in the erection and maintenance of the faulty barricades on the basis that, at the particular time and at the particular place on the sidewalk where appellee fell, they did not have actual knowledge of the barricade being down. This contention, of course, ignores completely the constructive knowledge that they should have had, in the exercise of any reasonable care under the circumstances, that the barricade in that particular place was apt to have been down and on in-

spection would have been found down at the time in question. They also erected the barricade in the first place and knew from experience that it was so faultily built as to constitute a menace to tenants.

If they did not actually know, the point is that they should have known that this wire would be down from the experience they had in this section of the grounds and in other sections of the grounds, and we contend that their past experiences constituted constructive notice to them of the defect.

The whole argument of the appellants in this case is that because they did not have actual knowledge they cannot be held responsible for the damage created. This overlooks entirely all of the law which is to the effect that they are liable for damages if they had *constructive* knowledge of defects. We submit that in this case, by their own testimony and evidence, the appellants show that they had constructive knowledge of the defects and knew of the dangers and that the defects were apt to cause damage to users of the sidewalks.

We agree with the statements of law advanced by appellants in their argument with reference to the obligations herein of the appellants toward appellee. Basically the principles are found in the decision of *Anderson v. Reeder*, 42 Wn.(2d) 45, 48, 253 P.(2d) 423, quoted in appellants' brief:

“Where the owner of premises leases parts thereof to different tenants and expressly or impliedly reserves other parts thereof for the common use of such tenants, it is his duty to exercise reasonable care to keep safe such parts which he reserves for common use, and over which he has con-

trol. Tenants who use such portions reserved for common use are invitees of the landlord. In order to render him liable to a tenant injured while using such portions, however, it must appear that there was reasonable cause to apprehend such injury. 32 Am. Jur. 561, Landlord and Tenant, Sec. 688."

and to the same effect is the rule stated in *Andrews v. McCutcheon*, 17 Wn.(2d) 340, 345-346, 135 P.(2d) 459:

" * * * When the landlord either expressly or impliedly reserves control over the stairway, whether there be one tenant or several, the tenant or tenants will be protected in his or their right to the use of the stairway, and the landlord has the legal duty to keep and maintain the stairway in a reasonably good and safe condition for use by such tenants and their invitees.

"The foregoing rules of law are announced and discussed in the following cases: *Lindbloom v. Berkman*, 43 Wash. 356, 86 Pac. 567; *Konick v. Champneys*, 108 Wash. 35, 183 Pac. 75, 6 A.L.R. 459; *Johnson v. Smith*, 114 Wash. 311, 194 Pac. 997; *McGinnis v. Keylon*, 135 Wash. 588, 238 Pac. 631; *Leuch v. Dessert*, 137 Wash. 293, 242 Pac. 14; *Holm v. Investment & Securities Co.*, 195 Wash. 52, 79 P.(2d) 708; *Brandt v. Rakauskas*, 112 Conn. 69, 151 Atl. 315; *Starr v. Sperry*, 184 Iowa 540, 167 N.W. 531; *Roman v. King*, 289 Mo. 641, 233 S.W. 161, 25 A.L.R. 1263, note p. 1273; and note 58 A.L.R. 1412. 4 Thompson on Real Property (Perm. ed.), pp. 88, 94, Secs. 1594, 1596. Restatement of the Law of Torts, p. 980, Sec. 361. 32 Am. Jur., Landlord and Tenant, p. 165, Sec. 170, p. 564, Sec. 689, p. 567. Sec. 691."

Likewise, in *Leuch v. Dessert*, 137 Wash. 293, 295, 242

Pac. 14, the court followed the rule announced in *Seattle v. Puget Sound Improvement Co.*, 47 Wash. 22, 91 Pac. 255, 125 Am. St. 884, 12 L.R.A.(N.S.) 949, which was a case where the owner of a building had a trapdoor over an areaway in the sidewalk used exclusively for the benefit of the building. The building itself had been leased to various tenants. There was nothing in their tenancy that gave them control of this areaway. The court held that the maintenance and actual possession of that part of the building was in the owner at all times and the court held that he was the one who was responsible for injury resulting to a pedestrian who had been injured by stumbling over the trapdoor. At page 296, the court stated:

“Situations similar to that in the instant case have been considered many times, and the rule we find to be as we have already announced it. Some of these authorities so holding are: *O'Connor v. Andrews*, 81 Tex. 28, 16 S.W. 628; *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346; *Yorra v. Lynch*, 226 Mass. 153, 115 N.E. 238; *Gilland v. Maynes*, 216 Mass. 581, 104 N.E. 555; *Trustees of Village of Canandaigua v. Foster*, 156 N.Y. 354, 50 N.E. 971, 66 Am. St. 575, 41 L.R.A. 554; *Jennings v. Van Schaick*, 108 N.Y. 530, 15 N.E. 424, 2 Am. St. 459; *Siggins v. McGill*, 72 N.J.L. 263, 62 Atl. 411, 111 Am.St. 666, 3 L.R.A.(N.S.) 316; *Branigan v. Lederer Realty Corp.*, 101 Atl.(R.I.) 122; *Perry v. Levy*, 87 N.J.L. 670, 94 Atl. 569; *Payne v. Irvin*, 144 Ill. 482, 33 N.E. 756; *Looney v. McLean*, 129 Mass. 33; *Bissell v. Lloyd*, 100 Ill. 214; *Security Sav. & Comm. Bank v. Sullivan*, 261 Fed. 461; *Wardman v. Hanlon*, 280 Fed. 988; *Frank v. Simon*, 109 App. Div. 38, 95 N.Y.Supp. 666; *Tauber*

v. Rochelsky, 90 Misc. Rep. 382, 153 N.Y.Supp. 199; *Fleischer v. Dworsky*, 90 Misc. Rep. 628, 153 N.Y.Supp. 951; *Gude & Co. v. Farley*, 28 Misc. Rep. 184, 58 N.Y.Supp. 1036; *MacNair v. Ames*, 29 R.I. 45, 68 Atl. 950; *Brown Co. v. O'Connor*, 151 S.W. (Tex. Civ. App.) 339."

In the instant case we certainly believe the appellants had reasonable cause to apprehend the injury that occurred to appellee, and had constructive knowledge, if not actual knowledge, of the defect in their barricades. We believe the appellants were negligent to the extreme in maintaining and continuing a known, dangerous defective barricade system.

In attempting to answer the brief of appellants herein, it is quite clear that the divergence of opinion in the case is brought on by the appellants complete lack of understanding of the meaning of constructive knowledge. The term, in itself, indicates it would not be actual knowledge but is a knowledge which should be learned by the party through their known experiences. Cases cited by appellant are all good law but are not applicable to the situation of the instant case. The cases dealing with invitees of department stores and other commercial establishments are all predicated on their particular facts and go off on the principle that no proof was adduced concerning the knowledge of the landlord or store owner of the defect. It is quite true that grease spots and obstructions on floors of department stores may not have come to the attention of the landlord; but in our case, for months the appellants knew of the defects and the dangers and installed a faulty system of maintenance to try and correct the

dangerous condition. Their attempt to do so, we see, was unsuccessful, as injury resulted to appellee from said defects.

IV. CONCLUSION

We respectfully submit that the decision of the District Judge, entering judgment in favor of the appellees in this cause, should be affirmed.

Respectfully submitted,

R. P. GUIMONT,
Attorney for Appellees.

No. 14399

United States
Court of Appeals
for the Ninth Circuit

D & H ELECTRIC COMPANY, a corporation,
Appellant,

vs.

M. STEPHENS MFG., INC., a corporation and
JACK McLOUGHLIN, doing business as Mc-
Loughlin Sales, Appellees.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 188, inclusive)

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

OCT 26 1954

No. 14399

United States
Court of Appeals
for the Ninth Circuit

D & H ELECTRIC COMPANY, a corporation,
Appellant,

vs.

M. STEPHENS MFG., INC., a corporation and
JACK McLOUGHLIN, doing business as Mc-
Loughlin Sales, Appellees.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 188, inclusive)

Appeal from the United States District Court for the Southern
District of California, Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer and Counterclaim	9
Answer to Counterclaim	18
Appeal:	
Certificate of Clerk to Transcript of Record	
on	34
Cost Bond on	29
Designation of Record on (DC).....	32
Designation of Record on (USCA).....	187
Notice of	28
Order Extending Time to Docket.....	31
Statement of Points on (USCA).....	185
Stipulation and Order Extending Time to	
Docket	31
Certificate of Clerk to Transcript of Record...	34
Complaint	3
Cost Bond on Appeal.....	29
Designation of Record on Appeal (DC).....	32
Designation of Record on Appeal (USCA)....	187

ii.

Findings of Fact and Conclusions of Law.....	19
Judgment, Final	27
Names and Addresses of Attorneys.....	1
Notice of Appeal	28
Opinion of the Court, Oral.....	167
Order Extending Time to Docket Appeal.....	31
Statement of Points on Appeal (USCA).....	185
Stipulation and Order Extending Time to Docket Appeal	31
Transcript of Court's Oral Opinion.....	167
Transcript of Proceedings and Testimony.....	35
Exhibits for Plaintiff:	
1—Patent in Suit No. 2,475,322.....	189
Admitted in Evidence	36
25—Drawing Prepared by R. S. Berry, “ $\frac{3}{8}$ in. DH and $\frac{3}{8}$ in. MS Couplings”..	192
Admitted in Evidence	104
26—Drawing Prepared by R. S. Berry, “ $\frac{1}{2}$ in. DH and $\frac{1}{2}$ in. MS Couplings”..	193
Admitted in Evidence	104
27—Drawing Prepared by R. S. Berry, “ $\frac{3}{4}$ in. DH and $\frac{3}{4}$ in. MS Couplings”..	194
Admitted in Evidence	104
28—Drawing Prepared by R. S. Berry, “1 in. DH and 1 in. MS Couplings”....	195
Admitted in Evidence	104

Transcript of Proceedings—(Continued)

Witnesses for Plaintiff:

Berry, R. S.

—direct	81
—cross	100
—recalled, direct	151

Friedman, Samuel W.

—direct	105
—cross	106
—recalled, direct	161

Horton, R. J.

—direct	37
—cross	55
—recalled, direct.....	74, 138, 166
—cross	78

Witness for Defendants:

Friedman, Samuel W.

—direct	110
—cross	121
—recalled, direct	124
—cross	131

NAMES AND ADDRESSES OF ATTORNEYS

For Plaintiff:

MASON & GRAHAM,
COLLINS MASON,
WILLIAM R. GRAHAM,

811 West Seventh Street,
Los Angeles 17, California.

For Defendants:

C. G. STRATTON,
LOUIS M. WELSH,

210 West 7th Street,
Los Angeles 14, California.

[1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court for the Southern District of California, Central Division

No. 14746-Y.—Civil

D & H ELECTRIC COMPANY, a corporation,
Plaintiff,

vs.

M. STEPHENS MFG., INC., a corporation; JACK McLOUGHLIN, doing business as McLOUGHLIN SALES; DOE I, DOE II and DOE COMPANY,
Defendants.

COMPLAINT FOR INFRINGEMENT OF U. S. LETTERS PATENT No. 2,475,322 AND FOR UNFAIR COMPETITION

Plaintiff complains of defendants and each of them and alleges:

First Cause of Action for Patent Infringement

I.

That plaintiff is a California corporation having its principal place of business in the County of Los Angeles, State of California, within the Southern District of California, Central Division.

Upon information and belief, that defendant M. Stephens Mfg., Inc., is a California corporation having a regular and established place of business in the City of Los Angeles, County of [2] Los Angeles, State of California, within the Southern District of California, Central Division.

Upon information and belief, that Jack Mc-

Loughlin is an individual doing business as McLoughlin Sales, and is a resident of the County of Los Angeles, State of California, within the Southern District of California, Central Division.

II.

That the true names and places of residence and places of business of defendants named herein as Doe I, Doe II and Doe Company are at present unknown to plaintiff, but, when discovered, plaintiff will ask leave of Court to insert the same herein by amendment.

III.

That jurisdiction is based upon 28 U.S.C. 1338.

IV.

That on July 5, 1949, United States Letters Patent 2,475,322 duly and legally issued to Richard J. Horton and Helen F. Bryane, now Helen F. Horton, for an invention in coupling device for flexible conduits.

V.

That by mesne assignment and transfer, said letters patent and all rights to sue and recover for past infringement thereof were duly and legally transferred to plaintiff prior to commencement of this action and plaintiff is still the owner thereof.

VI.

That for some time past defendants and each of them have infringed and still are infringing said United States Letters Patent 2,475,322, by making

and selling within the Southern [3] District of California, Central Division, and elsewhere, coupling devices for flexible conduits embodying the patented invention, and will continue to do so unless enjoined by this Court.

VII.

That the coupling devices for flexible conduits made and sold by plaintiff or under authority of plaintiff have been duly marked with the number of said letters patent and defendants have been notified in writing of said letters patent and of their infringement thereof.

VIII.

That said acts of defendants have been and are being committed wilfully and in bad faith.

Second Cause of Action for Unfair Competition

For a second and separate cause of action against the defendants and each of them plaintiff here incorporates paragraphs one (I) and two (II) of its first cause of action and alleges:

I.

That, commencing in or about the month of May, 1946, plaintiff developed and introduced to the trade a coupling device for flexible conduits, for which said United States Letters Patent No. 2,475,322 subsequently issued; that said coupling device is distinctive not only in the manner in which it functions to effect a coupling, but also in appearance; that plaintiff has ever since manufactured

and sold and continues to manufacture and sell said devices extensively in interstate commerce throughout the United States; has built up and owns and enjoys a valuable business and good will associated therewith; and the public has come to associate said device with plaintiff and no one else. [4]

II.

Jurisdiction of this second cause of action arises under and by virtue of 28 U.S.C.A. 1338(b) and 15 U.S.C.A. 1126.

III.

That after plaintiff developed and introduced said device and built up said business and good will, defendants engaged in and continue to engage in a scheme of unfair competition against plaintiff, and in carrying out said scheme have committed and continue to commit each and all of the following acts:

(a) Defendants copied and imitated said coupling device, both as to its distinctive manner of functioning and as to its distinctive appearance; and have made and sold and continue to make and sell said copies and imitations in interstate commerce in competition with plaintiff and without so marking or identifying said copies and imitations as to enable the public readily to distinguish the same from those made and sold by plaintiff;

(b) Defendants offered and attempted to purchase and acquire plaintiff's said business, as well as plaintiff's dies and molds used in the manufacture of plaintiff's said devices; that plaintiff re-

fused said offer and attempt and thereupon defendants attempted to coerce plaintiff into selling and turning over to defendants plaintiff's said business, dies and molds by making and publishing threats to plaintiff and to the trade that defendants would destroy plaintiff's said business and good will; and, ~~in pursuance of said attempt, defendants have adopted and pursued the policy of having their salesmen and representatives follow plaintiff's salesmen in the market and offer to sell said copies and imitations to the trade at prices far below the prices at which plaintiff has offered its said devices and at prices which could not be met by plaintiff without actual loss to plaintiff; and~~ [L. P. Y.]

(c) Defendants have represented to the trade and to plaintiff's customers that plaintiff's said patent is worthless.

IV.

That as a result of said acts of defendants, plaintiff has suffered loss of profits which it otherwise would have made as well as injury to its business and good will, in the sum of One Hundred Thousand Dollars (\$100,000.00), and defendants have derived unjust profits in a sum the true amount of which is at present unknown to plaintiff and which can only be determined by an accounting.

V.

That unless said acts of defendants be forthwith restrained by this Court, plaintiff will be further seriously and irreparably damaged in that plain-

tiff's business and good will will be totally destroyed.

VI.

That said acts of defendants have been deliberate, wanton and unconscionable.

Wherefore, plaintiff prays judgment against defendants and each of them as follows:

1. For a temporary and permanent injunction restraining defendants and each of them, as well as those controlled by them and each of them, from committing further acts of infringement of said United States Patent No. 2,475,322.

2. For an accounting of damages suffered by plaintiff as a result of said acts of infringement, and that said damages be trebled. [6]

3. For a temporary and permanent injunction restraining defendants and each of them, as well as those controlled by them and each of them, from committing any of the herein-alleged acts of unfair competition against plaintiff.

4. For damages in the sum of One Hundred Thousand Dollars (\$100,000.00) resulting from acts of unfair competition by defendants and each of them herein complained of.

5. For an accounting of and judgment for profits derived by defendants and each of them from the acts of unfair competition herein complained of.

6. For reasonable attorneys' fees.

7. For plaintiff's costs and disbursements herein.

8. For such other and further relief as to the Court may appear just and equitable.

D & H ELECTRIC COMPANY,
Plaintiff

By MASON & GRAHAM,
/s/ By COLLINS MASON,
Attorneys for Plaintiff [7]

[Endorsed]: Filed November 17, 1952.

[Title of District Court and Cause.]

ANSWER

Come now the defendants and in answer to the alleged First Cause of Action in the Complaint filed herein by the plaintiff, admit, deny and allege as follows:

I.

Admit, in answer to paragraph IV, that purported United States Letters Patent No. 2,475,322 are dated July 5, 1949 and were issued in the name of Richard J. Horton and Helen F. Bryane, [8] and that an alleged coupling device for flexible conduits is purported to be covered therein: deny that such patent was duly and legally issued to Richard J. Horton and Helen F. Bryane, or that said coupling device constitutes an invention.

II.

As to the averments in paragraph V, defendants

are without knowledge or information sufficient to form a belief as to the truth thereof.

III.

Deny each and every allegation of paragraph VI.

IV.

Admits that written notice from plaintiff was received by defendants alleging infringement of said Letters Patent, but deny each and every other allegation contained in paragraph VII.

V.

Deny each and every allegation of paragraph VIII.

In Answer to the Alleged Second Cause of Action of the Complaint, said Defendants Admit, Deny and alleges as follows:

VI.

Deny that said coupling device is distinctive in the manner in which it functions or distinctive in appearance, and deny that the public has come to associate said device with plaintiff and no one else.

As to the other averments of paragraph I, defendants are without knowledge or information sufficient to form a belief as to the truth thereof. [9]

VII.

Deny each and every allegation of paragraph III (including sub-paragraphs (a), (b) and (c) thereof).

VIII.

Deny each and every allegation of paragraphs IV and V, and particularly deny that defendants have engaged in acts of unfair competition against plaintiff.

IX.

Deny each and every allegation of paragraph VI.

Further Answering the Complaint, and for Separate, Alternate and Further Defenses, the said Defendants allege:

X.

Deny that the device shown, described and claimed in the Letters Patent in suit embodies any material or patentable advance over what was previously known to others skilled in the art; but, on the contrary, allege that the claim of said patent is invalid and void because the alleged improvements described and claimed therein, and all material and substantial parts thereof, have been, prior to the date of the alleged invention or discovery thereof by Richard J. Horton and Helen F. Bryane (now Helen F. Horton), described, published, patented or contained in Letters Patent and/or printed publications, as follows:

Number	Inventor	Date
1,494,524	Adamson	May 20, 1924
1,629,058	Wilson	May 17, 1927
1,775,128	Hunter	Sept. 9, 1930
1,830,250	Tiefenbacher	Nov. 3, 1931
1,973,170	Jacobi	Sept. 11, 1934
22,310	Great Britain	1910

Offered for sale by the General Electric Supply Corporation, 700 Turner Street, Los Angeles, California, more than one (1) year prior to the filing date of the patent in suit, and in other patents and publications of which the said defendants have not now sufficient identifying data, but which, when ascertained, the said defendants pray leave to add hereto by suitable amendment.

XI.

That Richard J. Horton and Helen F. Bryane were not the original and first inventors of the alleged invention purported to be covered by the Letters Patent in suit, or of any material or substantial part thereof, and that the same and every material and substantial part thereof was described and disclosed, prior to the alleged invention thereof, in printed publications, among others, in the specifications and drawings of the Letters Patent listed in paragraph X above, and in other publications of which the said defendants have not now sufficient identifying data, but which, when ascertained, the said defendants pray leave to add hereto by suitable amendment.

XII.

Allege that Patent No. 2,475,322 in suit is void and of no effect in law, in that devices containing the alleged improvements were known and in public use in the United States before the conception of, and/or before the reduction to practice by Richard J. Horton and Helen F. Bryane of, the alleged invention of the patent in suit, No. 2,475,322, by the

patentees named in said patents, whose places of knowledge, sale and/or use are the residences of the patentees given in said patents; and that said [11] alleged improvements were known, on sale and/or in public use in the United States for more than one (1) year prior to the application for United States Patent No. 2,475,322 by plaintiff and by Richard J. Horton and Helen F. Bryane in Los Angeles, California, and other places in the United States of America, and by the patentees named in said patents, whose places of sale and/or use are the residences of the patentees in said patents, respectively.

XIII.

Allege that while the application for the patent in suit was pending in the United States Patent Office, plaintiff's assignors, Richard J. Horton and Helen F. Bryane, through their attorney, so limited and confined the claims of the application therefor, under the requirements of the Commissioner of Patents, that the plaintiff herein cannot now seek or obtain an interpretation of the claim thereof sufficiently broad to cover any device made, used or sold by the said defendants.

XIV.

Allege that the art in connection with the device shown in said Letters Patent in suit was crowded prior to the alleged invention or discovery by Richard J. Horton and Helen F. Bryane; and that the conception of the alleged invention or discovery in said patent required no invention whatever, but

only ordinary mechanical skill; and that as a consequence the claim in suit fails to embody or disclose any patentable invention which was not already common knowledge in the art; and that such claim, therefore, is void for lack of invention.

XV.

Allege that the patent in suit is invalid and void [12] since the subject matter covered by the claim thereof was not originated by Richard J. Horton and Helen F. Bryane, but was disclosed to them, in whole or in part, by one or more other parties, including O. K. Jones, of 2700 San Marino Street, Los Angeles, California, and, therefore, the alleged invention in the patent in suit could never belong to plaintiff's assignors, Richard J. Horton and Helen F. Bryane, or to plaintiff.

XVI.

Allege that the claim of the patent in suit cannot be interpreted to cover any device made, used or sold by said defendants, for the reason that all said devices are constructed in accordance with patents and devices within the public knowledge prior to the alleged conception of the patent in suit by Richard J. Horton and Helen F. Bryane, and that, if the claim of said patent were so construed as to cover defendants' devices, it would be invalid as anticipated by the said prior patents and devices.

XVII.

Allege that the claim in suit does not cover any

valid or patentable combination, but embraces mere aggregations of elements which have no definite and proper combination or cooperation, and that, therefore, the claim in suit fails to cover patentable subject matter, and is, therefore, void; and that the claim in suit is invalid because of not being supported by the disclosure in the application for patent thereon.

XVIII.

Allege that the claim in suit is ambiguous, indefinite and uncertain, and is not distinct, and does not particularly point out the part, improvement or combination which [13] Richard J. Horton and Helen F. Bryane claimed as their alleged invention, as required by the Patent Statutes of the United States; and that the elements of the claim were all known prior to said alleged invention and result in no new and unexpected result.

XIX.

Allege that plaintiff has not marked its connectors made in accordance with Patent No. 2,475,322, with the said patent number, as required by the Patent Statutes of the United States, but instead has placed upon a large number of its said connectors the legend, "Pat. 668,790". That plaintiff does not now and never has owned Patent No. 668,790, or any part thereof, or any rights thereunder. That said connectors marked with such legend were sold by plaintiff in the United States prior to the commencement of this action.

Allege that plaintiff, because of such mismarking

as herein set forth, comes into Court with unclean hands and is estopped from enforcing any alleged claim of infringement contained in the Complaint herein.

As a Counterclaim of Defendants in this case, Defendants allege:

XX.

That plaintiff has engaged in acts of unfair competition against defendants, which have damaged the business and good will of defendants, by informing defendants' customers, distributors and suppliers that the connectors manufactured and sold by defendants infringe plaintiff's patent, when such is not the case, and by misrepresenting to plaintiff's customers that plaintiff had a suit or suits pending against one or more of the distributors of defendants' connectors, and by failing to inform [14] defendants that plaintiff considered that defendants' connectors infringed on Patent No. 2,475,332 until long after plaintiff had made said misstatements and misrepresentations, as aforesaid.

XXI.

That as result of said acts of plaintiff, defendants have suffered loss of profits which they otherwise would have made, as well as injury to their business and good will, in the sum of \$25,000.00, and that plaintiff threatens to continue making the charges of infringement as aforesaid, unless restrained by this Honorable Court. That defendants have no plain, speedy or adequate remedy at law.

Wherefore, defendants pray judgment against plaintiff decreeing as follows:

(1) That the Letters Patent in suit be declared invalid and void;

(2) That the defendants have not infringed said Letters Patent;

(3) For temporary and permanent injunctions restraining plaintiff, its agents, employees, officers and directors, and those acting in concert with plaintiff, from committing again any of the herein-alleged acts of unfair competition against the defendants;

(4) For damages in the sum of \$25,000.00 resulting from acts of unfair competition by plaintiff herein complained of;

(5) That defendants be awarded their [15] costs and reasonable attorney fees in this case;

(6) For such other, further and different relief as in equity and good conscience this Honorable Court may deem advisable in the premises.

C. G. STRATTON and
R. E. GEAUQUE,
Attorneys for Defendants

/s/ By C. G. STRATTON [16]

Affidavit of Service by Mail attached. [17]

[Endorsed]: Filed May 28, 1953.

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Comes Now the plaintiff-counter-defendant D & H Electric Company, a corporation, and for answer to defendants' counterclaim, deny, admit and allege as follows:

I.

Answering the allegations contained in paragraph XX thereof, deny the same save and except that it admits that it has informed some members of the trade that connectors made and sold by defendants-counterclaimants appear to infringe upon United States Letters Patent No. 2,475,322 and that it, plaintiff, has instituted suit therefor against the defendants herein named. Other than as herein specifically admitted, deny generally and specifically each and all of the allegations contained in said paragraph. [18]

II.

Answering the allegations contained in paragraph XXI, deny each and all of said allegations. Further answering the allegations contained in said paragraph, deny that as a result of any act of the plaintiff, defendants have suffered loss of profits which they otherwise would have made or injury to their business or good will in the sum of \$25,000.00 or in any sum.

D & H ELECTRIC COMPANY, a
corporation,
Plaintiff-counter-defendant

By MASON & GRAHAM,
/s/ By COLLINS MASON,
Its Attorneys [19]

Affidavit of Service by Mail attached. [20]

[Endorsed]: Filed June 1, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on for trial on January 5th and 6th, 1954, and the Court having heard the testimony, and having considered the oral arguments of counsel, makes the following Findings of Fact and Conclusions of Law: [21]

Findings of Fact

I.

That the plaintiff and defendant corporation are California corporations having regular and established places of business in the City of Los Angeles, County of Los Angeles, State of California. That the defendant Jack McLoughlin is an individual doing business as McLoughlin Sales, and is a resident of the County of Los Angeles, State of California.

II.

That the patent in suit, United States Letters Patent No. 2,475,322, on Coupling Device for Flexible Conduits, was issued on July 5, 1949 to Richard

J. Horton and Helen F. Bryane. That by mesne assignment said Letters Patent and all rights to sue and recover for past infringement thereon were duly and legally transferred to the plaintiff herein prior to the commencement of this action, and plaintiff ever since has been and now is the owner thereof.

III.

That no evidence was offered by plaintiff as to the date of the alleged invention of the subject matter of said Letters Patent in suit. Such alleged invention is, therefore, considered as being made on May 10, 1946, the date upon which the application for the patent in suit was filed in the United States Patent Office.

IV.

That the patent in suit contains only one claim, as follows:

“In a coupling for spirally wound, flexible [22] conduits, a tubular member having means at one end adapted to be affixed to the wall of a junction box or the like, the other end of said coupling being insertable within the end of a conduit and having a series of ribs extending substantially at right angles to the major axis of said tubular member and adapted to engage the convolutions of the conduit, said ribs being sequentially disposed in staggered relation along the outer surface of the conduit-engaging portion of said coupling, so as to define a spiral having a greater helical angle than the normal helical angle of the convolutions of the conduit.”

V.

That the device covered by the patent in suit is a simple one. It covers a combination of elements in a tubular member that has (a) a series of ribs extending substantially at right angles to its major axis, and (b) said ribs defining a spiral having a greater helical angle than the normal helical angle of the convolutions of the conduit. This combination is not found to be anticipated by the prior art cited by the defendants.

VI.

That the file wrapper shows that the original application for the patent in suit claimed great originality for the plaintiff's coupling, and contained nineteen claims, covering seven typewritten pages. Eventually, these were reduced to two claims, to wit, claims 2 and 10, the claim finally allowed, as quoted above, being originally claim 2. The patentees urged that since claim 10 defined a spiral having a greater helical [23] angle than the normal helical angle of the convolutions of the conduit [which is element (b) above of the patent in suit], claim 10 was patentable. The Patent Office Examiner, however, rejected this argument and in rejecting claim 10 said it was "FINAL", in capital letters. The reason given by the Examiner was that the prior patent to Hunter, of record, showed the full equivalent of this, because any difference that existed "between the differential helical angle is deemed to be no more than a mere matter of choice, design or expediency." Confronted with this ob-

jection, the patentees canceled and relinquished claim 10.

VII.

That the patentees of the patent in suit were required to elect which of the different forms of the invention would be elected, if a generic claim covering the different forms were not allowed. The patentees thereupon elected to prosecute claims drawn to Fig. 2 in the event no generic claims were allowed. No generic claim was ever allowed in the case. Fig. 2 shows the ribs 3, 4, 5 and 6 at right angles to the major axis of the tubular member 1.

VIII.

That the Patent Office rejected claims covering the ribs shown at 3, 4, 5 and 6 in the patent in suit, upon the mutilated threads shown in the following prior United States Letters Patent: Adamson 1,494,524, Wilson 1,629,058, Jacobi 1,973,170, and upon British patent No. 22,310. That except for the right angular arrangement of said ribs to [24] the major axis of the coupling, the patentees of the patent in suit acquiesced in said rejection. That this Court holds that except for such right angular arrangement, said ribs perform the same function as the mutilated threads of said prior patents, and except for said right angular arrangement, said ribs are anticipated by the mutilated threads of said prior patents. In endeavoring to obtain the allowance of the claim in suit, the patentees argued that it was one of the important things in their invention that their ribs were at right angles, whereas

interrupted screw threads, such as the foregoing prior patents showed, are not "at right angles to the axis of the coupling." Later on in the same letter, patentees argued again that their ribs were novel because they extend "at right angles to the axis of the sleeve." In the same letter to the Examiner, the patentees amended the claim in suit to state that their ribs were "substantially at right angles to the major axis of said tubular member." Since the foregoing two arguments that an important difference in patentees' structure over the prior art was that the patent in suit showed the ribs at right angles, were in the same letter as the above amendment that the ribs are at "substantially right angles," these arguments must be considered as giving the patentees' interpretation of the only novel feature of the patent in suit, to wit, having the ribs at right angles. Having been refused broader claims in the Patent Office, and the patentees having conceded that the right angular position of their ribs was the patentable feature of their claim, they cannot now disregard this feature and attempt to recapture their broad claims which were canceled.

IX.

That the operation of patentees' structure is that since their ribs form an angle of substantially 90° to the longitudinal axis of the coupling, there is a lengthwise stretching [25] action upon the conduit when it is screwed upon the patentees' coupling. On the other hand, the outside diameter of defendants' coupling is greater than the inside diameter

of the normal conduit, causing a lateral extending action by the ribs upon the interior of the conduit convolutions. This is shown by markings upon plaintiff's and defendants' respective couplings after they have been screwed into and then screwed out of normal conduits. Therefore, defendants' coupling operates and functions in a mode or manner different from plaintiff's.

X.

That the function of the plaintiff's and defendants' couplings is to fasten the conduit on to the coupling. This is old, as demonstrated on the witness stand by plaintiff's president. An exemplification of the Hunter patent cited by the defendant, viz., the prior "Jake" connector, showed that tools were required to remove it from a conduit, the same as plaintiff's and defendants' devices. Thus, since the result is old, no infringement can be predicated upon the similarity between plaintiff's and defendants' couplings on the ground that they both fasten conduits upon the couplings so that tools are required to release the conduits.

XI.

That the defendants made a few experimental, sample couplings along the line claimed in the patent in suit, and gave out one coupling each to a limited number of persons. The uncontradicted evidence is that they were not for sale and were never sold. This being a Court of Equity, no injunction is believed warranted since no likelihood exists of the

defendants commercially manufacturing or selling the patented device.

XII.

That the word "substantially" is not to be interpreted as meaning one or more degrees. The words "substantially at [26] right angles" are only to be taken to mean at right angles with the slight variation that would occur in manufacturing plaintiff's couplings by ordinary production methods without precision finishing same. Under the authority of *Schnitzer vs. California Corrugated Culvert Co.*, 140 F.2d 275 (C.A. 9), the proceedings in the Patent Office may be used to interpret the wording of a claim, and where the file wrapper contains evidence that the inventors understood a certain element of a claim in a narrow sense, then the courts should apply that narrow interpretation in an infringement suit. The twice-given argument in the file wrapper that plaintiff's ribs were at right angles and for this reason differed from the prior art must be taken as limiting the patent in suit to ribs at right angles with only such variations in manufacture which in ordinary, non-precision manufacturing methods would result when endeavoring to have the ribs at right angles. The dotted lines in Fig. 2 of the patent in suit indicate that the ribs 3, 4, 5 and 6 are at right angles to the major axis, which is the Figure elected to be prosecuted in this patent.

XIII.

That the defendants' couplings have ribs that are at a 2° to 6° angle to the longitudinal axis of the

coupling. Different sizes of couplings have the ribs at different angles. Thus the defendants' commercial couplings do not have ribs substantially at right angles to the major axis of the couplings.

Conclusions of Law

I.

The Court has jurisdiction of the parties and of the subject matter.

II.

The patent in suit, No. 2,475,322, issued July 5, 1949 on Coupling Device for Flexible Conduits, is good and valid in law. [27]

III.

That the defendants herein have not infringed upon the patent in suit, since the defendants' couplings do not have ribs substantially at right angles to the major axis of the coupling, and since the defendants' couplings have a different mode of operation, to wit, binding a conduit upon the coupling by lateral expansion of the coupling, whereas the device of the patent in suit binds a conduit upon its coupling by lengthwise extension of the conduit.

IV.

That no basis exists for entering an injunction in this case.

V.

That neither party is to be awarded costs or attorneys' fees.

Judgment will be entered accordingly.

Dated this 9th day of March, 1954.

/s/ LEON R. YANKWICH,

Chief Judge, United States District
Court [28]

Acknowledgment of Service attached. [29]

[Endorsed]: Filed March 9, 1954.

In the United States District Court of the South-
ern District of California, Central Division

No. 14,746-Y.

D & H ELECTRIC COMPANY, a corporation,
Plaintiff,

vs.

M. STEPHENS MFG., INC., a corporation; JACK
McLOUGHLIN, doing business as McLOUGH-
LIN SALES; DOE I; et al.,
Defendants.

JUDGMENT

This cause having come on for trial on January 5th and 6th, 1954, and the Court having heard the testimony and having considered the oral arguments of counsel, enters the following judgment:

I.

That United States Letters Patent No. 2,475,322,

issued July 5, 1949, on Coupling Device for Flexible Conduits, is good and valid in law. [30]

II.

That said Letters Patent has not been infringed by defendants, or either of them.

III.

That no injunction shall be entered in this case.

IV.

That neither party will recover costs or attorneys' fees from the other party.

Dated this 29th day of February, 1954.

/s/ LEON R. YANKWICH,

Chief Judge, United States District
Court [31]

Acknowledgment of Service attached. [32]

[Endorsed]: Judgment entered and filed March 9, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that D & H Electric Company, a corporation, plaintiff in the above entitled action, hereby appeals to the Court of Appeals for the Ninth Circuit, from that portion of the final judgment entered herein on the 9th day of March, 1954, holding that the United States Letters

Patent in suit No. 2,475,322 has not been infringed by defendants or either of them and that no injunction shall be entered.

Dated at Los Angeles, California, this 6th day of April, 1954.

MASON & GRAHAM,
/s/ By COLLINS MASON,
Attorneys for Plaintiff [33]

[Endorsed]: Filed April 8, 1954.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That we, D & H Electric Company, a corporation, as Principal, and The Travelers Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut, and authorized to carry on the business of Surety in the State of California, as Surety, are held and firmly bound unto M. Stephens Mfg. Inc., a corporation, Jack McLoughlin doing business as McLoughlin Sales, Doe I, Doe II and Doe Company, in the full and just sum of Two Hundred Fifty and No/100 Dollars (\$250.00), to be paid to the said Appellees, their heirs and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals this 5th day of April, 1954.

Whereas, on March 9, 1954, judgment was entered

in the District Court of the United States, Southern District of California, Central Division, in the above entitled case against the Appellant, and the Appellant has filed notice of appeal to the United States Court of Appeals for the Ninth District, in the State of California.

Now, Therefore, the condition of the above obligation is such that if the said Appellant shall prosecute his appeal to effect, and answer all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void, otherwise to remain in full force and virtue.

[Seal] D & H ELECTRIC COMPANY,
 a corporation,

[Seal] THE TRAVELERS INDEMNITY
 COMPANY,

/s/ By W. C. PHILLIPS, Attorney-in-Fact
Examined and recommended for approval as per
Rule 8.

/s/ COLLINS MASON,
 Attorney for Plaintiff

I hereby approve the foregoing bond. Dated the
8th day of April, 1954.

/s/ By EDMUND L. SMITH, Clerk

The premium charge for this bond is \$10.00 per
annum.

Notary Public Certificate attached.

[34]

[Endorsed]: Filed April 8, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
APPEAL

Counsel for plaintiff having requested an order extending the time within which plaintiff may docket the appeal herein, and having represented to the Court as his reasons for said request, that the reporter has not yet been able to prepare the reporter's transcript of the trial proceedings, and that Mr. C. G. Stratton, attorney for defendants, is absent from the city,

It Is Hereby Ordered that the time within which plaintiff may docket the appeal herein is hereby extended to and including the 7th day of June, 1954.

Dated at Los Angeles, California, this 7th day of May, 1954.

/s/ LEON R. YANKWICH,

United States District Judge [35]

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

STIPULATION AND ORDER EXTENDING
TIME TO DOCKET APPEAL

It Is Hereby Stipulated by and between the parties to this action, through their respect attorneys, that plaintiff appellant may have to and in-

cluding the 22nd day of June, 1954, within which to docket the appeal herein, which time now expires on June 7, 1954.

This stipulation is rendered necessary because of unavoidable delay in obtaining the reporter's transcript. [40]

Dated at Los Angeles, California, this 28th day of May, 1954.

C. G. STRATTON,
LOUIS M. WELSH,

/s/ By LOUIS M. WELSH,
Attorneys for Defendants-Appellees

MASON & GRAHAM,

/s/ By COLLINS MASON,
Attorneys for Plaintiff-Appellant

It Is So Ordered. Dated June 3, 1954.

/s/ BEN HARRISON,
United States District Judge [41]

[Endorsed]: Filed June 3, 1954.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The Clerk of this Court is hereby requested to transmit to the United States Court of Appeals for the Ninth Circuit, under his hand and the seal of this Court, the following portions of the record, proceedings, and evidence to be contained in the record on appeal herein:

1. Complaint, filed November 17, 1952;
2. Answer and Counterclaim, filed May 28, 1953;
3. Answer to Counterclaim, filed June 1, 1953;
4. Reporter's transcript, January 5 and January 6, 1954, pages 1 to 180, inclusive;
5. Reporter's transcript of proceedings on January 6, 1954, containing opinion delivered orally by the Court, pages 1 [42] to 21 inclusive;
6. Plaintiff's exhibits 1 to 34 inclusive.
7. Defendants' exhibits A to D inclusive;
8. Findings of Fact and Conclusions of Law, filed March 9, 1954;
9. Final Judgment entered March 9, 1954, filed March 9, 1954;
10. Notice of Appeal;
11. Cost Bond on Appeal;
12. Order Extending Time to Docket Appeal;
13. Concise Statement of Points on Appeal;
14. Stipulation and Order Extending Time to Docket Appeal;
15. This Designation.

Dated at Los Angeles, California, this 3rd day of June, 1954.

MASON & GRAHAM,

/s/ By COLLINS MASON,

Attorneys for Plaintiff-

Appellant

[43]

Affidavit of Service by Mail attached.

[44]

[Endorsed]: Filed June 4, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 44, inclusive, contain the original Complaint; Answer and Counterclaim; Answer to Counterclaim; Findings of Fact and Conclusions of Law; Final Judgment; Notice of Appeal; Cost Bond on Appeal; Two Orders Extending Time to Docket Appeal; Statement of Points on Appeal and Designation of Record on Appeal which, together with the Original Exhibits and Reporter's Transcript of Proceedings on January 5 and 6, 1954, in three volumes, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 18th day of June, A.D. 1954.

[Seal]

EDMUND L. SMITH,
Clerk

/s/ By THEODORE HOCKE,
Chief Deputy

In the United States District Court for the Southern District of California, Central Division

No. 14,746-Y.—Civil

D & H ELECTRIC COMPANY, a corporation,
Plaintiff,

vs.

M. STEPHENS MFG., INC., a corporation: et al.,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Tuesday, Jan. 5, 1954, 10 a.m.

Honorable Leon R. Yankwich, Judge Presiding.

Appearances: For the Plaintiff: Mason & Graham, by Collins Mason, Esq., 811 West 7th St., Los Angeles 17, Calif. For the Defendants: C. G. Stratton, Esq., and Louis M. Welsh, Esq., 210 West 7th St., Los Angeles 14, Calif. [1*]

The Court: Call the calendar.

The Clerk: No. 14,746-Y, D & H Electric Company vs. M. Stephens Mfg, Inc.; Mr. Mason, Mr. Stratton and Mr. Welsh appearing.

Shall I call the next case, your Honor?

The Court: Well, are you answering "Ready"?

Mr. Mason: The plaintiff is ready, your Honor.

Mr. Stratton: Yes.

The Court: All right.

(The court hears another matter.)

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Court: All right, gentlemen, we will proceed with the cause on trial.

Mr. Stratton: If the court please, I would like to associate on the record for the defendant Mr. Louis M. Welsh.

The Court: His name appears on the calendar.

The Clerk: I had advance knowledge, your Honor, so I put it on the calendar.

The Court: Is Mr. Welsh a member of the California bar?

Mr. Welsh: Oh, yes, I am a member of this court, your Honor.

The Court: All right. You may proceed, Mr. Mason. [4]

* * * * *

The Court: All right. Let us get the testimony.

Mr. Mason: First I would like to offer in evidence the patent in suit, No. 2,475,322.

The Court: All right.

Mr. Mason: And, as I understand it, Mr. Stratton will stipulate the title in the plaintiff.

Mr. Welsh: It is so stipulated.

The Court: All right.

The Clerk: Plaintiff's Exhibit No. 1 in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 1, was received in evidence.)

[See Book of Exhibits.]

Mr. Mason: I will call Mr. Horton. [10]

R. J. HORTON

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: R. J. Horton.

The Court: Before you proceed, gentlemen, I think there should be a dismissal as to all the fictitious names, persons or corporations who have not been served.

Mr. Mason: Yes, your Honor. I will move to dismiss as to——

The Court: Doe I, Doe II, and Doe Company.

Mr. Mason: ——all the Doe defendants, your Honor.

The Court: All right, the dismissal will be entered.

Mr. Mason: And I will state at this time, your Honor, that while there is an unfair-competition count in the complaint, we do not intend to present evidence on that as such, except in so far as it may aggravate the infringement.

The Court: All right.

Direct Examination

Q. (By Mr. Mason): Mr. Horton, are you an officer of the plaintiff, D & H Electric Company?

A. Yes, sir.

Q. What office do you hold?

A. I am the sales manager and president of the company. [11]

Q. How long have you held that position?

(Testimony of R. J. Horton.)

A. I have been president of it ever since we incorporated, which was in 1946, I believe.

Q. 1946? A. I believe it was 1946.

Q. Now, does the plaintiff corporation make a coupling device for flexible conduits?

A. Sir?

Q. Does the plaintiff corporation make connectors for flexible conduits? A. Yes.

Mr. Mason: I will ask that this be marked for identification, your Honor, which is the $\frac{3}{8}$ -inch connector.

The Clerk: Plaintiff's Exhibit No. 2 for identification only.

(The device referred to was marked Plaintiff's Exhibit No. 2 for identification.)

The Clerk: Plaintiff's Exhibit No. 3 is marked for identification only.

(The device referred to was marked Plaintiff's Exhibit No. 3 for identification.)

Mr. Mason: That being the $\frac{1}{2}$ -inch connector.

The Clerk: Yes.

Mr. Mason: I ask that the $\frac{3}{4}$ -inch coupling be marked as the next exhibit. [12]

The Clerk: Plaintiff's Exhibit No. 4 marked for identification only.

(The device referred to was marked Plaintiff's Exhibit No. 4 for identification.)

Mr. Mason: The next exhibit for identification is the plaintiff's 1-inch connector.

Mr. Welsh: Will that be Exhibit 5 for identification?

(Testimony of R. J. Horton.)

The Clerk: Plaintiff's Exhibit No. 5 marked for identification only.

(The device referred to was marked Plaintiff's Exhibit No. 5 for identification.)

Mr. Stratton: What size is that?

Mr. Mason: 1-inch.

As the next one, plaintiff's 1/2-inch coupling.

The Clerk: That is Plaintiff's Exhibit 6 marked for identification only.

(The device referred to was marked Plaintiff's Exhibit No. 6 for identification.)

Mr. Mason: As the next exhibit, this 1/2-inch adapter.

The Clerk: Plaintiff's Exhibit No. 7 marked for identification.

(The device referred to was marked Plaintiff's Exhibit No. 7 for identification.)

Q. (By Mr. Mason): I show you, Mr. Horton, Plaintiff's Exhibits 2 to 7, inclusive, for identification, and ask you if you recognize those.

I will start with No. 1.

A. Yes, on No. 1.

Q. Now, what is Exhibit No. 2?

A. Exhibit 2 is a 3/8-inch flexible conduit connector. [13]

Q. All right. No. 3?

A. This is a 1/2-inch flexible conduit connector. This (indicating) is a 3/4-inch flexible conduit connector.

Q. You are referring to Exhibit 4?

A. No. 4.

(Testimony of R. J. Horton.)

This is a 1-inch flexible conduit connector.

The Court: When you say "this," you are naming them.

Mr. Mason: That is Exhibit No. 5.

The Witness: What number is this?

Mr. Mason: No. 6. That should be No. 6. It has not been marked yet.

The Witness: 1/2-inch flexible conduit coupling.

This is known as a flexed EMT adapter (indicating).

Q. (By Mr. Mason): Now, those are all of your manufacture? A. Yes.

Q. And how long have those been on the market? A. Since 1946.

At one time we had a little different collar on it. Then we eliminated that.

The Court: Gentlemen, for the record, let us put something in the record to explain the manner of operation.

Wherein do these couplings differ from ordinary couplings, grooved connecting pipes and things like that, which fit in? [14]

The Witness: Your Honor, this is the type——

The Court: You are talking about exhibit——

Mr. Mason: Let me have it marked, your Honor.

The Clerk: This is Plaintiff's Exhibit No. 8 marked for identification only.

(The device referred to was marked Plaintiff's Exhibit No. 8 for identification.)

Q. (By Mr. Mason): Now, I show you Exhibit No. 8, Mr. Horton, and ask you to explain to the

(Testimony of R. J. Horton.)

court how these connector devices are used and in what manner they differ from the connectors that were on the market prior to your device. And I will ask you to wait for a moment while these are marked.

The Clerk: Plaintiff's Exhibits 9, 10, and 11 marked for identification only.

(The devices referred to were marked Plaintiff's Exhibits Nos. 9, 10, and 11 for identification.)

Q. (By Mr. Mason): I show you Plaintiff's Exhibits 8 to 11 for identification and will ask you to point out to the court how these devices are used and how they differ from the connectors that were in use up to the time you brought yours out.

A. This fitting here——

Q. Referring to Exhibit 8 now?

A. Yes. This fitting here is known as a Thomas-Betts, [15] that has been on the market for many, many years.

Q. While you are on that, will you describe how that is utilized?

A. Well, this acts as a clamp on the flex, and when you pull the wires through, you are supposed to ream the flex. They use this type of flex in most cities.

Q. The clamp fits on the exterior?

A. On the exterior, yes.

My fitting automatically reams the flex and grips it from the inside instead of the outside.

Your Honor, this was the old type flex that they

(Testimony of R. J. Horton.)

have had on the market for many, many years, that is the Thomas & Betts.

This connector works from the outside of the flex to clamp on, using the screws.

The Court: Yes.

The Witness: When using this fitting, they are supposed to ream the inside of the flex. Otherwise they scrape the wires in a lot of cases.

On this type of fitting, when used on motor runs, it will vibrate and work off. It is a very common thing to go to a machine shop or factory and find this fitting has worked out from its fitting.

This fitting here, which is the one I am referring to——

Q. (By Mr. Mason): Now you are referring to the part [16] by which that flexible tubing is connected to the junction box?

A. That is right. This fits into the box the same as it does down at this end.

This is a locknut up here (indicating).

This fitting here screws inside of the flex, which automatically reams the flex and automatically clamps tight so that the vibration does not pull it off.

This one happens to be Stephens', right here.

Q. That is the defendant's device?

A. The defendant's.

This one is mine (indicating).

Q. Now, you have been describing this shorter one of those conduits, is that right?

A. That is right.

(Testimony of R. J. Horton.)

The Court: The point I am trying to get at is, wherein does that differ from an ordinary coupling where you thread in opposite directions two pieces of pipe and screw them together? Wherein does this differ from that?

Mr. Mason: I was going into that with Mr. Berry, your Honor, with drawings. It is difficult to explain it.

The Court: Well, I want to get an idea, I want to get a main idea so I will see what you are talking about.

The Witness: I think this one here will give him a better example of it. [17]

The Court: Yes.

The Witness: In here, this is known as a coupling, a flexible conduit coupling.

Q. (By Mr. Mason): You are referring to Exhibit 9?

A. You loosen those four screws and take that out in order to use it.

The Court: Yes.

The Witness: This here (indicating) fits inside.

May I use those tools, please, so I can take this apart?

The Court: Yes.

Q. (By Mr. Mason): You are now referring to the plaintiff's device, a coupling device?

A. Yes.

Can you hold that, Mr. Mason?

Mr. Mason: Yes.

(Testimony of R. J. Horton.)

The Witness: You better hold on to the pliers. You can't hold it there.

The Court: I didn't mean to give you all that work.

The Witness: Well, I can show you on the smaller size here. This is the smaller size of coupling.

The Court: All right, go ahead.

The Witness: This screws inside of the flex, which automatically reams it and automatically makes a perfect ground all the way through it. This type of fitting——

Q. (By Mr. Mason): Referring now to Exhibit No. 6, [18] which you just referred to, can you unscrew this without the use of tools after inserting it into the pipe?

A. Not if it is flexed to Underwriters' specifications, measurements.

Now, this type here——

Q. Referring to Exhibit——

A. No. 8, I believe it is, isn't it?

Q. ——No. 9.

A. No. 9, this fitting here is limited to so many places because of its screws and the fact that it works its way out.

The Court: Yes.

The Witness: You cannot use it in a concealed wall or motor runs or any place like that. If you have a wide-open space, say a two-foot working clearance, you can use this type of fitting provided it is not on a motor works.

(Testimony of R. J. Horton.)

This fitting (indicating) you can use on all motor works or in the walls or any place, extending around, or use it to put short pieces of flexible conduit in.

The Court: All right.

Q. (By Mr. Mason): Now, you have been referring here to Exhibit No. 9. In the earlier part of that discussion you were referring to this sleeve-like clamp on one end of this tubing, and in the latter part of your answer you were referring to the coupling marked "DH" here as part of [19] Exhibit No. 9? A. That is right, yes.

Q. Now, this coupling exhibit marked "DH", is that one of the defendant's or one of yours?

A. That is mine.

The Court: I see.

Q. (By Mr. Mason): Now you are referring to Exhibit 11. Will you explain that?

A. This is the way we used to have to do when we used it for stubouts for garage runs, or for little concrete block houses, or for motor runs, where we were coming down a wall with steel tubing leading to a motor run, we would have to put on a steel tube connector and clamp it with a pipe coupling and a flex connector to extend it over for a motor run. I eliminated those by using this type DH 1050T here.

Now, tightening up here——

Q. You are referring now to Exhibit 10.

A. There is a little expansion ring inside of that, that makes that draw tight.

(Testimony of R. J. Horton.)

The Court: Yes.

Mr. Mason: I don't know whether you have explained to the court the manner in which your connector differs——

The Court: Gentlemen, have you a paper copy of the patent?

Mr. Mason: Yes, your Honor.

The Court: I would like to have an extra copy. I just [20] want to have it in front of me.

All right. Go ahead.

Mr. Welsh: We have a prior-art book also, your Honor.

The Court: All right. Go ahead.

Mr. Mason: Will you read the question as far as I went, please?

(The record was read by the reporter as follows:

“Mr. Mason: I don't know whether you have explained to the court the manner in which your connector differs——”

Q. (By Mr. Mason—continuing): ——from conventionally threaded connector.

A. Well, my fitting screws inside, automatically reams the flexible conduit. It automatically makes a perfect ground for the flex, which is a big item in the wiring. It will not vibrate off. You can vibrate it all day long and it will not shake off, where other types of fittings do.

Q. Do you know why that is?

A. It cross-threads.

Mr. Welsh: I would like to move to strike what-

(Testimony of R. J. Horton.)

ever part of the answer has been given, for the purpose of an objection, your Honor. I would like to object to the question on the ground that it is too all-inclusive. The question was regarding other types. I think we should limit ourselves to the type he is speaking of. [21]

The Court: No, no. He was asked to show the difference between this and the ordinary threaded coupling, which is what I wanted to find out. The motion will be denied.

Go ahead.

The Witness: This fitting acts as a cross-thread when it goes in——

The Court: Yes.

The Witness: ——which pulls this down (indicating), as you can see, and makes it grip tight.

The Court: In other words, as I get it, if you use this, then you don't need to worry about threading or anything like that, it just goes in and stays in, is that it?

The Witness: You have to screw it in. Yes.

The Court: You screw it in?

The Witness: Yes.

The Court: And it stays in?

The Witness: That is right, and it makes a connector.

The Court: And are these conduits now made in standard sizes, all of them, or are they of different sizes, I mean for ordinary wiring like in the Los Angeles area where everything has to be in conduits?

(Testimony of R. J. Horton.)

The Witness: Every city has its code, and then we have what we call the National Code, and it varies. Now, in five districts, they can use conduit or flexible conduit.

The Court: I mean, do conduits come in standard sizes? [22] Is that a standard size?

The Witness: Yes.

The Court: Or do they come in different sizes?

The Witness: We have what we call the Fire Underwriters' specifications, that they have to live up to.

The Court: I see.

The Witness: Now, once in a while there will be a piece of flex get on the market that is over-size. Now, we have a book of standards to go by.

The Court: All right. That is all I want to know. Go ahead.

(Coupling and conduit were marked Plaintiff's Exhibit No. 12 for identification.)

Q. (By Mr. Mason): I show you plaintiff's exhibit marked for identification as Plaintiff's Exhibit 12 and ask you if you know what that is?

A. This is known as a Jake connector. This has spiral for screwing inside. You see, this screws right inside, it follows the conduit right around; by running up, jamming on this——

The Court: And will that work on any standard conduit?

The Witness: Yes.

Q. (By Mr. Mason): Now, in the connector that you have just referred to, Exhibit No. 12——

(Testimony of R. J. Horton.)

A. My hands were too slippery. Take it out. Let me [23] take it out.

The Court: Yes.

The Witness: I rolled it up over this (indicating).

The Court: Speak up so the reporter can hear you.

The Witness: I had run it over, over this little shoulder here, so as to make it bind when I screwed it in there, see.

Now, I just run it down and then just butt it (illustrating).

But if you put this collar on, then it holds. But without the collar, it doesn't hold.

The Court: Then it doesn't hold.

(Lengths of conduit were marked Plaintiff's Exhibits Nos. 13, 14, 15, and 16, respectively, for identification.)

The Clerk: Plaintiff's Exhibits 13, 14, 15, and 16 marked for identification only.

Q. (By Mr. Mason): I show you Plaintiff's Exhibits 13 to 16, inclusive, for identification, and ask you to explain what those are.

A. This is known as $\frac{3}{8}$ -inch flexible conduit or what is called Greenfield in the East, but in the West it is called flexible conduit.

Q. You are referring to Exhibit 13?

A. This is $\frac{1}{2}$ -inch flexible conduit or Greenfield [24] (indicating).

This (indicating) is $\frac{3}{4}$ -inch flex conduit.

This (indicating) is 1-inch flexible conduit.

(Testimony of R. J. Horton.)

Q. Now, would you say that those are typical lengths of flexible conduit such as are sold for use in connection with junction boxes?

A. Typical in sizes.

Q. Have you marked the devices marketed and sold by the plaintiff with the number of the patent in suit? A. Yes, I have.

Q. Can you tell the court in round figures approximately how many of these coupling devices which you have described you have sold since you started in 1946?

A. Not exactly. I can give it approximately.

Q. Just approximately, in round figures?

A. Four million, or better.

Q. Could you give the dollar value of those?

A. Approximately, or just a rough guess, \$200,000.

Q. What? A. \$200,000 worth.

Q. When did it first come to your attention that the defendants were manufacturing a coupling device such as you are complaining about in this action?

A. We got a letter from our agent in St. Paul, I believe it was in '50, '51, 1950 or '51, I am not positive [25] on that. I would have to check the records to see.

Q. Is that the first information you had that the defendants were infringing?

A. Yes, it was.

Mr. Welsh: Your Honor, I move that the answer be stricken on the ground that the testimony is

(Testimony of R. J. Horton.)

hearsay and not the best evidence, and incompetent, irrelevant, and immaterial.

The Court: Will you read the question and answer?

(Record read as follows:

("Q. When did it first come to your attention that the defendants were manufacturing a coupling device such as you are complaining about in this action?

("A. We got a letter from our agent in St. Paul, I believe it was in '50, '51, 1950 or '51, I am not positive on that. I would have to check the records to see.'")

The Court: I will strike the answer. You can give the date and the time, and the manner can be determined later on.

Q. (By Mr. Mason): I will ask you to state when you first saw the device of the defendant.

A. When I first saw it was in San Francisco, in 1951. I believe it was in October. Very possibly it was in November. Approximately that date.

Mr. Mason: Will you mark these, please?

(Devices were marked Plaintiff's Exhibits Nos. 17, 18, 19, 20, 21, and 22, respectively, for identification.) [26]

The Clerk: Plaintiff's Exhibits 17, 18, 19, 20, 21, and 22 marked for identification only.

The Court: While you are having those marked, let us have a brief recess.

(Recess.)

The Court: You may proceed.

(Testimony of R. J. Horton.)

Q. (By Mr. Mason): I show you Plaintiff's Exhibits 17 to 22, inclusive, and ask you if those are the defendants' devices which you charge to infringe?

A. Yes. This is one (indicating); yes, yes.

The Court: Now, are we keeping track of all of these, Mr. Childress?

The Clerk: As long as the tags stay on them, yes, sir.

The Witness: I have one here without a tag on it. This one right here.

The Court: Take it away, then, until you start using it.

The Witness: This is the tag, I believe, right here.

Mr. Welsh: Maybe we better find out. What is the description of Plaintiff's Exhibit No. 12, Mr. Childress?

The Witness: That is a 1/2-inch Jake coupling.

Mr. Welsh: Yes, that is it.

Q. (By Mr. Mason): Does your company put out any advertising literature? A. Yes.

Mr. Mason: May I have these marked? [27]

(Documents were marked Plaintiff's Exhibits

Nos. 23 and 24, respectively, for identification.)

The Clerk: Plaintiff's Exhibits 23 and 24 marked for identification.

Q. (By Mr. Mason): I show you Plaintiff's Exhibits 23 and 24 for identification and ask you if those are items of your advertising?

(Testimony of R. J. Horton.)

A. Yes. We have a later sheet that shows the 90-degree connector in it. That is the older.

Q. And on Exhibit 24, does that show your prices?

A. Yes, but this is an earlier price list. Since we have had to drop our prices, these are changed now.

Q. How does the price at which the D & H Electric Company sells its connectors compare with the price at which the defendants sell their connectors?

Mr. Welsh: I object to the question as being incompetent, irrelevant, and immaterial. The prices at which the two parties sell their connectors do not bear upon the issues before this court. The unfair-competition count was dismissed, as your Honor will recall.

Mr. Mason: I think it goes to show the aggravation of the infringement, your Honor.

The Court: I think, if there is infringement, there is no question of aggravation.

Mr. Mason: Well, I will withdraw the question then. [28]

The Court: We do not allow punitive damages in patent infringement. I will sustain the objection. It doesn't bear on anything.

He might tell us the success of it by telling us what sales he made, either in money terms or in identical terms, and all that. That is permissible as preliminary.

Mr. Mason: He has testified to that, your Honor.

The Court: I thought he did.

(Testimony of R. J. Horton.)

Mr. Mason: Yes.

The Court: And the fact that he was undersold, I don't think is material. I will tell you the only case in which I allowed it. I don't know whether it was your case. You gentlemen are before me in so many different capacities, on one side or another, I can't tell which—the only case in which I allowed it was in a case where a person had had a contract with the inventor and then he decided that by making them he could save money. In that case, I allowed it, allowed it to go in, because of the relationship that existed, to explain why he may have indulged in this infringement. I forget which case it was. I wrote an opinion on it, I remember. I remember the case but, except in a case like that, to show that it was not fortuitous, that is the point I am making, to show that the infringement was not fortuitous, but, even if it was fortuitous, it doesn't make any difference, intent is not material. If it infringes, it infringes, whether [29] you have intended to or not. But, of course, where you set out deliberately to do a certain thing, to imitate a thing which you had used under a license before, then it has a bearing on the suit, but, except in a case like that, the price at which it was sold would not bear on the matter.

I will sustain the objection.

Q. (By Mr. Mason): Now, where is the office and place of business of the plaintiff corporation?

A. What?

(Question read.)

(Testimony of R. J. Horton.)

A. It is in Los Angeles.

Mr. Mason: You may cross examine.

The Court: Now, before you go on, have all these been offered?

Mr. Mason: No, your Honor. I will. Thank you for calling it to my attention.

The Court: Well, unless you have to tie them up, I think they ought to go in before cross examination begins.

Mr. Mason: I think the patent was received.

The Court: Yes, the patent is already in.

Mr. Mason: I would like to offer Exhibits 2 to 24, inclusive.

The Court: Yes, they may all go in.

Mr. Welsh: There is no objection. Only the exhibits that have been marked were offered, your Honor. [30]

The Court: All right.

Then the clerk has to change the stamp on the markings. Then all of these are in now.

(The devices, objects, and documents referred to, marked Plaintiff's Exhibits Nos. 2 to 24, inclusive, were received in evidence.)

The Court: All right, go ahead.

Cross Examination

Q. (By Mr. Welsh): Mr. Horton, when exactly did you start to produce your connector?

A. We started, I believe it was, in March or in April of 1946.

Q. In March or April of 1946, but do you have

(Testimony of R. J. Horton.)

any records to show when you started production of your connectors? A. Yes.

Q. Do you have those with you?

A. I am not sure that I have; no, we don't have them with us.

Mr. Welsh: Will you have them here this afternoon, sir? Can you have them here this afternoon?

Mr. Mason: Well, their office is quite a way from here. I don't know what the materiality is.

Mr. Welsh: Well, I am determining how soon prior to the [31] application for the patent production was started.

The Court: Well, I gather your only defense is non-infringement. You are not attacking the validity of the patent?

Mr. Welsh: Yes, sir, we have a count in there, a defense on the validity of the patent.

The Court: How is that? Well, the general one that it wasn't within the two-year period, or what?

Mr. Welsh: Well, we have alleged, your Honor, all of the classic defenses.

The Court: Yes, I know it is very difficult to get you patent lawyers away from those classic answers.

Mr. Welsh: Frankly, we do not have any evidence to show that the patented product was produced more than a year before the application, and we don't know, and I think we are entitled to ask that question. The only way we can know is from the witness.

The Court: Well, if he doesn't have it available, you will have to take his word for it, and the fact

(Testimony of R. J. Horton.)

that we don't have better evidence, and I don't want to continue the case. It looks to me like a rather simple case involving rather simple issues.

Mr. Welsh: It won't take longer.

The Court: All right. If you can bring it here this afternoon, bring it back at 2:00 o'clock. [32]

The Witness: What time will we close?

The Court: At 12:00 o'clock. Can you be back at 2:00 o'clock?

The Witness: I will be able to go there and back, I think.

The Court: If you are delayed a little, it won't matter. They can put on another witness then, but be back as near to 2:00 o'clock as you can.

The Witness: Yes.

The Court: All right. He will get it for you.

Mr. Welsh: Thank you, sir.

Q. Now, what part, if any, did Mr. O. K. Jones have to do in the invention of yours, Mr. Horton?

A. Nothing. He was chief electrical inspector of the City when we patented this.

Q. Were any of the ideas of the invention given to you by O. K. Jones?

A. No, sir.

Q. Are you the sole inventor?

A. Mrs. Horton and myself.

The Court: Was she the Bryane in the patent?

The Witness: Yes, she was the Bryane at the time.

Q. (By Mr. Welsh): Did Mrs. Horton, or the

(Testimony of R. J. Horton.)

former Miss Bryane, contribute anything to the conception or development of the invention? [33]

A. We both worked together on it all the way through.

Q. When you first put out your product, your connector, did you at that time mark it with anything from the Patent Office, with any patent number?

A. Not a patent number. At first I believe we had "Patent pending." I am not positive of that. It has been so long ago since I have seen one.

"Patent applied for," I believe it was.

Mr. Welsh: May I have this marked as defendants' exhibit first in order?

The Clerk: Defendants' Exhibit A marked for identification only.

(The device referred to was marked Defendants' Exhibit A for identification.)

Q. (By Mr. Welsh): I show you Defendants' Exhibit A for identification and ask you if you will please tell me what that is, sir?

A. I can't read the numbers on it, but the "D & H" I can see.

Q. Well, describe the item that I hand to you.

A. It is a D & H $\frac{3}{4}$ -inch connector.

Q. I will read this number here, "668,790," and your counsel can check me on it. Does that number mean anything to you?

A. I don't know the numbers. [34]

Q. Well, is that the patent number?

A. I don't know.

(Testimony of R. J. Horton.)

Q. Well, did you ever mark your device with any number other than the patent number?

A. At first we had the wrong number on, through an error of the office that had given us the number.

Q. And the patent number actually is over a million, isn't it? A. I really don't know.

Mr. Welsh: Well, counsel, will you stipulate that this number is the number of the application?

Mr. Mason: What is the number?

Mr. Welsh: The number is 668,790.

Mr. Mason: Yes.

Q. (By Mr. Welsh): When did you first put that number on this Defendants' Exhibit A for identification, the number 668,790?

A. I don't know the exact dates.

Q. Well, can you tell me in relationship to the time the patent was issued, when you put it on?

A. I would say within a month or two, approximately.

Q. One or two? A month or two, or what?

A. After we had gotten the number.

Q. Now, the serial number that I have just read, 668,790, was first given to you by the Patent Office on May [35] 10, 1946. Is that when you put the number on your device?

A. I would say not.

Q. Do you know how many connectors you made with this number, or for how long a period of time you had this number on it? A. No, I don't.

Mr. Mason: I will state, counsel, that Mrs.

(Testimony of R. J. Horton.)

Horton has more detailed information as to that, and I will make her available for questioning regarding it.

The Court: What is the answer to this inquiry? Certainly they didn't have any. I presume the numbering is not given until the patent is issued, although I assume the number of the application is given out. I don't see the object of the inquiry.

Mr. Welsh: Well, your Honor, it goes to the question of notice, of how long notice was given to other persons that he had a patent, because this is not a patent number, and it also would go to the question of coming in with unclean hands if it were marked prior to the time that any patent whatsoever was given.

The Court: What number has it there?

Mr. Welsh: It has the application number 668,790.

The Court: That would be legitimate.

Mr. Welsh: No, sir. The application number has nothing to do with the patent number. [36]

The Court: But a layman might think that that is the number which he is going to get ultimately.

Mr. Welsh: I realize that it can be made by pure error, there is no question about that, but if it is put on here, the application number can be put on as soon as the application is made, and if it is put on as soon as the application is made but before the patent was issued, it would then be misrepresentation.

The Court: Oh, well——

(Testimony of R. J. Horton.)

Mr. Welsh: I would like to offer this.

The Court: All right. It may be received.

The Clerk: Defendants' Exhibit A in evidence.

(The device referred to, marked Defendants' Exhibit A, was received in evidence.)

Q. (By Mr. Welsh): Now, your counsel has introduced several of these various devices and you have all of them in front of you, I think, here, Mr. Horton, and you were explaining to the court how yours differ from these various devices. Now, with the exception of the Jake device, Plaintiff's Exhibit No. 12, none of the other devices were cited by the Patent Office when you made your application, were they?

A. I wasn't asked that question.

Q. I am asking it now.

The Court: That is a question of fact, but I don't think he should be asked that question. He is not a patent [37] counsel. It is quite evident, unless the file wrapper contains others. The patent on its face shows that the only prior art mentioned was that given in the patent file, from Adamson to Jacobi, and a foreign patent—six patents.

Mr. Welsh: Let me amend the question.

Q. The connector for conduits to junction boxes, such as mentioned, similar to yours and prior to yours, was this Jake connector, Exhibit No. 12, is that right?

The Court: If he knew that. Ask him if he knew that at the time.

Q. (By Mr. Welsh): Did you know of the

(Testimony of R. J. Horton.)

Jake connector at the time you made your invention?

A. Well, I got to checking over here a few days ago the first time that I had seen a Jake connector, and it definitely was after, and I had stated at another time that I had seen it before, but I hadn't.

Q. Do you remember when your deposition was taken you stated that you had seen the connector?

A. Yes, I did, but in checking it back over I feel sure that I hadn't seen it before, because I know at the time when this came up, then is when I went out and found them.

Q. How was it that at the time your deposition was taken you testified under oath, as you just said, that you knew of the Jake connector before your invention? Now you say you made a check. What kind of a check did you make to [38] determine that?

A. Well, I had never bought from General Electric, and General Electric was the company that had carried those types of fittings.

Q. And you never had seen it before you bought it from General Electric? A. No, sir.

Q. Do you have records that show when you first bought from General Electric?

A. I do not, but I know that I went there and bought them afterwards, after I had heard about the Jake, to check it, to see what it was.

Q. It is your belief now that you didn't know of the Jake before you made your invention?

A. It is my belief that I didn't, yes.

(Testimony of R. J. Horton.)

Q. And it was your belief that you did, several months ago when your deposition was taken, is that right?

A. At that time I was confused on it.

Q. And now you are perfectly clear?

A. Yes, I have checked into it.

Q. Has there been any change in the manner in which you have manufactured your connector since 1946?

A. In the principle of it, no.

Q. Well, have there been any changes?

A. When I first started, I had a collar on it. When [39] I first made my first connector, I didn't have a collar on it, but they asked me to have a collar put on it, which I fought and tried to get away with and I didn't succeed. Later we eliminated the collar, but the principle of it has been the same all the way through.

Q. Other than that, have there been any changes since 1946?

A. Not in the principle of it, no.

The Court: Aside from the principle, has there been any change in the structure?

The Witness: Eliminated the collar, sir, your Honor.

The Court: You eliminated the collar?

The Witness: Yes.

Q. (By Mr. Welsh): Is that all?

A. It had more fittings, different types for fittings.

(Testimony of R. J. Horton.)

Q. By "different types," you mean difference in the angles? A. One-half——

Q. Different sizes? A. Different sizes.

Q. But, other than that, no changes, is that right? A. Nothing that I know of.

Q. Did you change the size of the ribs, either by making them longer or higher?

A. Not since we went through Underwriters.

Q. When was that?

A. We experimented, trying the different sizes of lugs to see what difference it would make when we went through Underwriters, and I believe that was in 1948.

Q. You believe it was when?

A. I believe it was 1948.

Q. What change did you make then, when you went through Underwriters?

A. They were the same as before, with the exception of one connector that has a larger lug, a little bit larger lug.

Q. By "lugs," you mean these things I have drawn on here (indicating sketch)? A. Yes.

Q. These things. When you say it is larger, do you mean it is longer or higher?

A. It is higher.

Q. It is higher. When did you first put that change into manufacturing operations? In other words, when did you first put out on the market a connector with a lug that was higher?

A. As soon as the second time we went to Un-

(Testimony of R. J. Horton.)

derwriters, we came back and experimented with it to see if it would make any difference.

Q. You see, I don't know when you went to Underwriters, so if you can tell me the dates or the year? [41]

A. I can't tell you the date.

Q. In what year?

A. I believe it was in 1948.

Q. Pardon me?

A. I believe it was in 1948.

Q. It could have been later?

A. Not on the half-inch. We have had other fittings that went into the Underwriters later than that.

Q. Well, my original question was, were any changes made? In other words, you have made changes on other than the 1/2-inch ones later than 1948, is that right?

A. I don't know of any.

Q. Pardon me?

A. I do not know of any.

Q. Would Mrs. Horton know that?

A. I doubt it.

Q. As far as you know, if Mrs. Horton knows that, of course, if you know whether she knows it or not?

A. I doubt it.

Q. I beg your pardon?

A. I doubt it.

Q. But you did increase the height of this lug, as you refer to it?

A. One of the connectors.

Q. What material is this made of? [42]

A. Zamak No. 5.

Q. Is that a type of zinc?

A. Yes.

(Testimony of R. J. Horton.)

Q. And of what material is the flex made?

A. Steel, aluminum-steel.

Q. The steel is harder than the zinc, I assume, is that right? A. It should be.

Q. Then your coupling doesn't actually abrade the flex?

A. It cuts the thin edge of a burr that is left on the flex. Regardless of the angle you cut your flex on, you have a burr on a setscrew in there that it actually leaves.

Q. It shaves off a part of the device? In other words, your device has softer metal so that it would compress your device, isn't that correct?

A. Not necessarily.

Q. Well, do you know whether it does or it doesn't? A. I don't think so.

Q. You don't know, do you?

A. I am not positive.

Q. Reading from your patent, your claim provides for "a coupling for spirally wound, flexible conduits, a tubular member having means at one end adapted to be affixed to the wall of a junction box or the like," and so forth. Now, does this connector that you have in evidence here, which is [43] designated as Plaintiff's Exhibit No. 6, have the means at one end to adapt itself to a junction box or the like? A. It does not.

Q. It does not? A. It does not.

This is the coupling.

The Court: What is the number?

Mr. Welsh: No 6.

(Testimony of R. J. Horton.)

The Court: You were going to say something?

The Witness: This is the coupling.

The Court: Yes.

The Witness: This is the connector that goes to a box.

The Court: Yes.

The Witness: One with threads at the end.

The Court: All right.

Q. (By Mr. Welsh): Now, even the standard flex which the Underwriters Laboratories authorize is subject to some variation in size, is it not, small variations in size?

A. Small variations, yes.

Q. Is it true that your connector will stick very tightly if the variation is on the minimum side, but that it might be easy to take your connector out if the flex is on the large side, if I make myself clear?

A. Not if it is Underwriters' specifications.

Q. In other words, your connector, even on what we might [44] call the largest size, the largest perimeter variation——

A. Yes.

Q. ——even on that you cannot unscrew it without using pliers or something of that sort, is that right?

A. Sometimes you can; but the majority, no.

Q. Now, your connector is marked with the letters "MS"? A. Definitely not.

Q. Excuse me. "DH", that is correct?

A. Yes.

(Testimony of R. J. Horton.)

Q. And the accused connector is marked with the letters "MS", is it not? A. Right.

Q. And to cause the junction of your device, you stretch the conduit into which it is inserted, is that correct? A. That is right.

Q. Now, looking at my diagram here, is it not true, sir, that when your connector is inserted into the flex, the pressure of the flex is applied at either end of the lugs as you have described them? If you know.

A. I think my witness who will follow me will be able to give you a better description than I can.

Q. You don't know the answer to that?

A. No. [45]

Q. Well, generally, though, you can answer this, can't you: The principle of your patent is a cross-threading one, is that right?

A. A jammed thread.

Q. A jammed thread or cross-thread. In other words, it doesn't mate with the convolutions of the conduit? A. That is right.

Q. Is that correct? A. It does not.

Q. And consequently has a jamming or a cross-threading action? A. Yes.

Q. And in that way does it differ from the Jake patent? A. Yes.

Q. The Jake patent is meant to mate, is that right?

A. It is meant to follow the spiral of the flex.

Q. That is what I meant by mating.

A. Yes.

(Testimony of R. J. Horton.)

Q. Yes. Thank you. Can you tell me why you decided to raise the lugs on your device?

A. In experimenting with it——

Q. Well, I assume that, but I mean, what was the result of the experiments that led you to that conclusion?

A. Running into flex that was not of Underwriters' specifications, in trying to overcome that. Instead of that, [46] we went to the Underwriters and had them go to the flex people and bring it up to their specifications.

Q. Well, it actually worked better on the Underwriters' specified flex, didn't it, when you raised the bumps?

A. Not necessarily.

Q. Then you are not allowed, are you, to use flex that doesn't meet Underwriters' specifications?

A. Can you stop them? The electrical people can't.

Q. You don't sell yours for that purpose though, do you? You do not advertise it to meet——

A. Definitely not.

Q. No. And you do not advertise it to meet unauthorized flex, do you?

A. No, sir.

The Court: Well, you aim to conform. Of course, leaving aside the standard of the Building Code, there are places where the minute details as to conduits, and so forth, that we have in the Los Angeles ordinances, do not apply, isn't that true?

The Witness: We have a National Code and the Fire Underwriters, which try to make them live up to specifications, but in a lot of places there will

(Testimony of R. J. Horton.)

be machines that will bet out of adjustment, or there will be oversized flex that will get on the market. If they catch it and determine it, they will make them pick them up. [47]

The Court: That is right, but you do not particularly cater to that type of patronage?

The Witness: Definitely not.

The Court: You try to deal with those who are standard?

The Witness: Legitimate places.

The Court: Standard.

The Witness: That is right.

Q. (By Mr. Welsh): Do you know what angle your lug or rib makes with the longitudinal axis of your device? A. No, sir.

Q. Do you know approximately what it is?

A. No, sir.

Q. You have no idea?

The Court: He says he doesn't.

The Witness: I have a man that has the instruments there that can show that.

Q. (By Mr. Welsh): Do you know what angle the lugs or the ribs on the accused device make?

A. No.

Q. You testified to the amount of volume and the amount of money,—

A. Approximately.

Q. —in selling your devices since 1946. Has it increased each year, or what has been the history of the company in sales? [48]

(Testimony of R. J. Horton.)

A. That I would have to leave up to Mrs. Horton.

Q. Well, you know in a general way?

The Court: Well, in a general way? We are not holding an accounting now.

Q. (By Mr. Welsh): Just in general?

A. It has increased.

The Court: It has increased?

The Witness: Yes.

Q. (By Mr. Welsh): It has increased after 1950, 1951 was a little better than 1950, and 1952 better than 1951?

A. I would say after I started traveling, it increased.

Q. When did you go on the road?

A. In 1951.

Q. In 1951. It was better in 1952 than it was in 1951, was it, your business was of a larger volume, a larger gross?

A. I can't say.

Q. Was it better in 1953 than in 1952?

A. I wouldn't be able to give you the exact figures on that.

Q. No, I don't want the exact figures. Just generally, have you done better?

A. It is about the same.

Q. What connection do you have with the plaintiff company, D & H Electric Company, what is your position?

A. I am the president of it and the sales manager. [49]

Q. Well, you have a general idea of the financial

(Testimony of R. J. Horton.)

condition and whether you are doing better or not, as president?

The Court: He has given you his best recollection. I do not think you should take the time trying to pin him down to details. He may be wrong.

Mr. Welsh: I just want a fair answer as to whether it was better or whether it wasn't better.

The Court: Well, he said it was better.

Mr. Welsh: Very well, sir.

The Court: The reason we allow that is to show the patent is reduced to practice and it is not a mere paper patent. That is the only object of showing it has had success. As to the details of it, that is a question of accounting when you get to that.

Q. (By Mr. Welsh): Mr. Horton, you know of no instance where there has been any confusion in the minds of the public as between your device and the accused device? A. Yes, I have.

The Court: Well, I am going to sustain the objection that should have been made. Confusion of source is not an element in a patent-infringement case. Confusion of source is a matter in an unfair-competition cause.

Mr. Welsh: That is true, your Honor.

The Court: It is also a matter in trade-mark causes. [50]

Mr. Welsh: I withdraw it. It was in my notes before the dismissal of the other cause of action.

The Witness: It shows right here, your Honor.

The Court: Just a moment. When we start talking, you quit talking.

(Testimony of R. J. Horton.)

The Witness: I am sorry.

The Court: We are not interested in that. Confusion of source is not material in this case.

Mr. Welsh: That is all we have for now.

The Court: All right. You will examine him as to the other when he brings that in.

Is there any redirect at the present time?

Mr. Mason: No redirect.

The Court: Step down and you can go ahead and try to get that information. You better get together with Mr. Welsh.

Leave those there. You are through with them.

The Witness: I want my tools.

The Court: Yes, you can take your tools.

You get together with counsel and see what information he wants, so that you won't make a trip for one thing and then they might want something else.

All right, gentlemen, 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day, Tuesday, January 5, 1954.) [51]

Los Angeles, Tuesday, Jan. 5, 1954, 2:00 p.m.

The Court: You may proceed.

Mr. Mason: If your Honor please, I would like permission to recall Mr. Horton for two or three questions. I would like to have him make a demonstration.

The Court: All right.

R. J. HORTON

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Direct Examination

Q. (By Mr. Mason): Mr. Horton, I show you Plaintiff's Exhibits 2, 3, 4 and 5, as well as Plaintiff's Exhibits 13, 14, 15 and 16, and I will ask you first if you will take Exhibit No. 2 and insert it in the end of Exhibit No. 13, which is the conduit, and state whether or not you find that it enters freely when you rotate it relative to the conduit and whether it becomes locked after the insertion.

A. This should have the string off so as to keep it from binding on it.

The Court: Well, put it back when you are through, and that is all right.

The Witness: My hands are sweaty.

Q. (By Mr. Mason): Do you need to tighten it any more? [52]

Q. Well, it should go up a little tighter.

Q. Well take your pliers, if you will.

(The witness uses pliers on device.)

Q. Do you find that that has become locked?

A. Yes.

Q. Will you demonstrate?

A. (Witness demonstrates.) If you put enough pressure on it, you can take it off.

Q. But you did find that it had become locked relative to the tubing after you had inserted it?

(Testimony of R. J. Horton.)

A. Yes.

The Court: Let me see it.

Q. (By Mr. Mason): Now, I will ask you to take the device, which is one of the plaintiff's connectors, and insert it in the conduit, Exhibit 14, in like manner.

A. My hands are too sweaty to draw it up.

(Witness does as requested.)

Q. Now, will you see if you can remove that with your hands?

A. (Witness demonstrates.) No.

Q. Now, will you remove it with your pliers?

A. (Witness does as requested.)

The Court: Is that the accused device?

Mr. Mason: No, your Honor. These are the plaintiff's.

The Court: Number two is his, too? [53]

Mr. Mason: No. That is just a different size, your Honor.

Mr. Welsh: They are both plaintiff's devices, your Honor.

The Court: They are both plaintiff's devices.

Mr. Mason: All these four are plaintiff's devices.

The Court: I see.

Q. (By Mr. Mason): Now, is it a correct statement, Mr. Horton, that it did rotate into the conduit freely but became locked and you had to take a pliers to remove it? A. Yes.

Mr. Welsh: I object to that as a leading question, your Honor.

(Testimony of R. J. Horton.)

The Court: Well, I know we saw that happen. Now, what is the object of the demonstration?

Mr. Mason: I just want to show how they operate and show that the plaintiff's and the defendants' operate in the same manner, but we had four different sizes and I had to take four different ones.

The Court: All right.

Q. (By Mr. Mason): Now, I will ask you to take Exhibit No. 4 and insert it in Exhibit 15 in like manner.

A. (Witness complies with counsel's request.)

Q. Now, is that locked, in that position?

A. Yes. [54]

Q. Now, will you determine whether you can remove it freely with your hands?

A. (Witness demonstrates.) No.

Q. Remove it with the pliers then.

A. (Witness complies with counsel's request.)

The Court: All right.

Q. (By Mr. Mason): Now, will you take Exhibit No. 5 and insert it in Exhibit 16 in like manner?

A. (Witness complies with counsel's request.)

Q. Now, can you state whether or not that has become locked? A. Yes, that is locked.

Q. Can you remove that with your hands?

A. I can. I did not have it locked. I am sorry.

Q. Well, lock it, then.

A. My hands are too slippery to do it by hand.

Mr. Welsh: Are you still using plaintiff's devices?

(Testimony of R. J. Horton.)

Mr. Mason: Yes, plaintiff's devices.

(Witness demonstrates.)

The Witness: I can't take it out. I can't take it out.

(Witness uses pliers in separating devices, being assisted by Mr. Welsh.)

Q. (By Mr. Mason): Did you find that that became locked in the tubing?

A. Yes, sir. [55]

Q. Now, I will ask you to take the defendants' devices; first Exhibit 17, and insert it in Exhibit 13, and state whether or not you get the same results.

A. (Witness complies with counsel's request.) I could not remove it by hand.

Q. Now, do you find that that has become locked? A. Yes, it has.

Q. Now, can you remove it without the use of pliers? A. I cannot.

Q. Well, remove it, please, with the pliers.

A. (Witness complies with counsel's request.)

Q. I will ask you to take Exhibit 18, which is defendants' device, and insert it in Exhibit 14, and state the result.

A. It is in his.

Q. Now will you determine whether or not you can remove it with your hands without the use of pliers?

Mr. Welsh: I am sure I can't, if you can't.

A. I cannot.

(Testimony of R. J. Horton.)

Q. (By Mr. Mason): And you found that it had become locked, did you? A. Yes.

Q. Will you remove it, then, with the pliers?

A. (Witness complies with counsel's request.)

Q. Now I will ask you to take Exhibit 19, which is one [56] of defendants' devices, and insert it in Exhibit 15.

A. (Witness complies with counsel's request.)

Q. Now will you test it to see whether or not it is locked?

A. (Witness demonstrates.) I can't.

Q. Is it locked so that you cannot remove it with your hands without the aid of pliers?

A. That is right.

Q. Now will you remove it with the pliers, then?

A. (Witness complies with counsel's request.)

Q. Now I will ask you to take Plaintiff's Exhibit 20, which is the defendants' 1-inch coupling or connector, and insert it in Exhibit 16.

A. (Witness complies with counsel's request.)

Q. Now will you test to see whether or not it is locked?

A. (Witness demonstrates.)

Q. What did you find? A. It is locked.

Q. Now will you take the pliers and remove that, please?

A. (Witness complies with counsel's request.)

Mr. Mason: You may cross-examine. [57]

Cross Examination

Q. (By Mr. Welsh): Mr. Horton, I will ask you

(Testimony of R. J. Horton.)

to examine Plaintiff's Exhibit No. 3, which is the D & H size what? A. Half-inch.

Q. D & H half-inch. Do you not see abrasions on the ends of the two ribs, way over on the ends of the ribs, indicating where they have been jammed into the flex, shiny parts on the ends?

A. I see a marking right in here (indicating), but I don't see it on the lug.

Q. Well, maybe the light isn't too good. It is in the right light for me but it may not be for you. Do you find a shiny part on the edge of the lug indicating where it came in contact with the flex?

A. I can't see that.

Q. You can't. All right. Now I will hand you Plaintiff's Exhibit 18, which is a half-inch accused coupling, and ask you if you do not find abrasive marks all along the surface of the rib.

A. Well, I see the same mark right on here (indicating) as I see on the other.

Q. Yes, but do you not see abrasions on the rib itself all along the surface of the rib.

A. No, I do not. [58]

Q. You do not?

A. My eyes are not too good. I am sorry.

The Court: What do you mean, these things (indicating)?

Mr. Welsh: No. I mean on the rib itself, your Honor, on the very edge of the rib—the very end of it.

The Court: If you will tilt it this way, you will see it. Hold it like that, with the light on it, and

(Testimony of R. J. Horton.)

you can see it. Hold it way from you. No. The other way. It is a little lighter in coloring, but not very noticeable.

The Witness: My eyes are not good enough for that.

Mr. Welsh: Your Honor, this is the accused device, and the abrasions on the surface of the ribs.

The Court: Oh, yes, I see them.

Mr. Welsh: That is all.

The Court: I see them. It is a little lighter.

The Witness: Oh, yes, yes, I see it now.

The Court: And you can see it?

The Witness: In other words, right across there (indicating).

The Court: Corresponding to the same thing right here (indicating).

The Witness: Yes.

The Court: In other words, something has rubbed there.

The Witness: Yes.

The Court: In other words, it doesn't fit in tightly [59] the way grooves would fit it.

Mr. Welsh: That is all.

The Court: All right. Step down.

Call your next witness.

R. S. BERRY

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: R. S. Berry.

Direct Examination

Q. (By Mr. Mason): What is your profession, Mr. Berry?

A. I am a patent attorney and attorney at law.

Q. How long have you been a patent attorney?

A. Since 1907.

Q. How long have you been a lawyer?

A. Since 1919.

Q. And has your practice been in Los Angeles all the time?

A. Not altogether. I spent from 1906 to 1913 in San Francisco.

Q. And have you acted as expert in any patent cases?

A. On several occasions. One before his Honor. I believe one of the earliest patent cases that you tried, in connection with a tortilla-manufacturing machine. [60]

The Court: Oh, yes, I remember the tortilla case. I remember they invented an easier way of making a tortilla by saving portions of the dough and throwing it back in.

The Witness: That is right. You have a good memory.

The Court: That is right.

(Testimony of R. S. Berry.)

Q. (By Mr. Mason): You are the attorney who took out the important patent in suit, No. 2,475,322?

A. I am.

Q. Are you familiar with that patent?

A. I did not write the specification or prosecute the application personally, but I am familiar with it.

Q. You have, preparatory to testifying here, restudied it, have you? A. I have.

Q. Now, are you familiar with the coupling devices that have been offered in evidence here as the plaintiff's devices, being Exhibits 2, 3, 4, and 5, and the defendants' devices, Exhibits 17, 18, 19, and 20? A. Yes.

Q. And have you examined and measured the conduits which are in evidence as Exhibits 13, 14, 15, and 16? A. Yes.

Q. Now, have you made any drawings preparatory to testifying here, in order to illustrate your testimony? A. I have. [61]

Q. And are those the drawings on the board and which have been marked for identification as Exhibits 25, 26, 27, and 28?

(The drawings referred to were marked Plaintiff's Exhibits Nos. 25, 26, 27, and 28 for identification.)

A. Those are the drawings I prepared.

Mr. Welsh: Excuse me. May I interrupt for a moment to get the numbers on those, just so I can identify them?

Thank you.

(Testimony of R. S. Berry.)

Q. (By Mr. Mason): Now, Mr. Berry, by reference to the drawings, will you explain to the court the operation of the plaintiff's coupling, connector devices as shown on those drawings and by the exhibits?

A. You say the operation?

Q. Yes, And in doing so, will you explain how it is possible for those couplings, connector devices to be inserted in the tubing and how it is that they become locked in the tubing?

A. Well, the coupling element in each instance is inserted in the conduit and rotated relative thereto, to bring spaced ribs on the coupling into engagement with the spiral channels in the conduit.

Q. Now, will you mark with some identifying letter on the drawing the ribs to which you have referred?

A. I designate the rib, or one of the ribs, with the [62] letter "A." That rib appears on each of the four sheets of drawings, Exhibits 25, 26, 27, and 28, designated "A". (Witness marking on exhibits.) I am designating the rib on the DH coupling of the plaintiff.

Q. Now, how are those ribs arranged on the coupling?

A. In the DH coupling on Exhibit 25 they extend perpendicular to the longitudinal axis of the coupling, and they are spaced apart on centers one-eighth of an inch.

They extend circumferentially of the coupling approximately 60 degrees with a space of 120 degrees between the approximate ends of the ribs, there

(Testimony of R. S. Berry.)

being two of such ribs on the diametrically opposite sides of the coupling.

The ribs are also arranged so that a pair of them, or the entire group, considered collectively, define what is termed a helical angle. That helical angle varies in the different sizes of the coupling according to its diameter.

On the smaller coupling, designated or referred to as a $\frac{3}{8}$ -inch coupling, that helical angle, as far as that part is concerned, and all the rest of them, can be measured and should be measured on centers, diametrically opposed centers, taken from either the base or side of the rib, or from the peak or the center of the rib, as the peak of a thread.

On the $\frac{3}{8}$ -inch coupling, the angle taken at the base I have designated here as 19 degrees according to my reading of the protractor, and the one from the ridges is 15 degrees. [63]

Now, in the coupling designated as a $\frac{1}{2}$ -inch coupling, on Exhibit No. 26, the base helical angle is 14 degrees, while the peak angle is 12 degrees.

In the $\frac{3}{4}$ -inch coupling, Exhibit No. 27, the base angle is 10 degrees, while that of the peak is 9 degrees.

In Exhibit No. 28, the base angle is 12 degrees, while that at the peak is 10 degrees.

Those degrees represent the general helical angle of the ribs in relation to each other.

And my calculations here I believe to be reasonably accurate because I spent a lot of time to de-

(Testimony of R. S. Berry.)

termine them. They might fluctuate perhaps the thickness of a pencil line, but not materially.

Q. Now, in each of those cases when you measured the conduit, what did you find to be the helical angle defined by the convolution of the conduit?

A. In the conduit on Exhibit No. 25, ordinarily designated as a $\frac{3}{8}$ -inch conduit, the helical angle is 12 degrees, which, in comparison with that of the $\frac{3}{8}$ -inch coupling of either 15 degrees or 19 degrees, of course, is much less.

The helical angle of a half-inch conduit on Exhibit 26 is 8 degrees as compared with the larger helical angle of either 12 or 14 degrees of the associated coupling.

The helical angle of the $\frac{3}{4}$ -inch conduit of Exhibit 27 is 8.5 degrees as compared with either 9 or 10 degrees of its [64] associated coupling.

In the 1-inch conduit of Exhibit 28, the helical angle is 9 degrees as compared with either 10 or 12 degrees of the 1-inch DH coupling.

Q. Now, in arriving at the helical angles of the various conduits shown on Exhibits 25 to 28, inclusive, have you measured the conduits which have been offered in evidence as Exhibits 13, 14, 15, and 16, respectively?

A. I have, and with the aid of a mirror and calipers.

Q. Now, what is the purpose of the spacing of the ribs which you have described relative to the helical angle formed by the convolutions of the conduit?

(Testimony of R. S. Berry.)

A. It is manifestly for the purpose of effecting a wedge engagement between the ribs of the coupling and the internal channels of the conduit.

Q. What is the purpose of making the ribs 60 degrees about the circumference of the collar as distinguished from extending them entirely around the circumference?

A. That is to permit the spirals, the internal spirals of the conduit, to pass from one side of a rib to another, of an opposite rib. Without that gap or an adequate gap between the ends of the ribs, it would be impossible to mesh the coupling with the conduit. It is the same or analogous to attempting to mesh the threads of a bolt of one pitch with the threads of another of another pitch, but, by providing this [65] break or gap or space between the ends of the ribs, the screw engagement is effected by the one rib passing across a spiral of the conduit into an adjacent channel.

Q. Now, in order to obtain the free entry of the coupling into the conduit and then have it become locked in the manner which has been demonstrated here, what are the elements shown in those drawings which are essential to that operation?

A. The relative spacing of the ribs, plus their greater helical angle relative to the helical angle of the spirals of the conduit.

Q. Now will you refer to the illustrations of the accused devices on those various drawings, Exhibits 25 to 28, inclusive, and state what if any differences you find as between the devices that plaintiff illus-

(Testimony of R. S. Berry.)

trated on those drawings and the devices of the defendants?

A. In each instance the relative spacing of the ribs and the relative helical angles and those of the respective conduits are identical to those of the D & H Company.

Q. When you say the D & H, you refer to the plaintiff?

A. Yes, D & H is the plaintiff's, and we have designated the defendants' as the MS coupling. That is answering it generally. If you wish, I can take each one as shown on each drawing.

Q. Please take each one on each drawing, will you? [66]

A. On Exhibit No. 25, a $\frac{3}{8}$ -inch coupling, the spacing of the ribs on centers is one-eighth of an inch. They extend 60 degrees around the circumference of the coupling.

The helical angle at the base of opposite ribs is 19 degrees, and at their peak is 15 degrees, as compared with the 12-degree helical angle of the conduit.

In Exhibit 26, the $\frac{1}{2}$ -inch——

Q. Just a moment. Before you leave that, are those the same dimensions you have described for the plaintiff's coupling, the $\frac{3}{8}$ -inch size?

A. Yes, sir, correct.

The same is true as to Exhibit 26, that the dimensions of the MS coupling are identical to those of the DH coupling, the ribs being spaced apart on

(Testimony of R. S. Berry.)

centers longitudinally of the coupling at $5/32$ of an inch on centers.

Their helical angle is 14 degrees at the base and 12 degrees at the peak, as compared with the 8-degree helical angle of the conduit.

On Exhibit 27, the spacings of the MS coupling are $5/32$ of an inch on centers, with a 10-degree helical angle at the base and a 9-degree helical angle at the peak, as compared with the 8.5-degree helical angle of the conduit, which is identical to that of the $3/4$ -inch DH coupling of the plaintiff.

On Exhibit 28, the 1-inch MS coupling, the ribs are spaced $13/64$ of an inch on centers. They extend 60 degrees [67] around the circumference of the coupling, as is also true—and I did not mention that before—as to the extension, 60-degree extension, I believe, of the $1/2$ -inch and the $3/4$ -inch couplings. Their helical angle is 12 degrees at the base and 10 degrees at the peak, corresponding to that helical angle or the helical angle of the 1-inch DH coupling relative to the 9-degree helical angle of the conduit.

Q. Well, is this a correct statement or summary of your testimony about the spacing of the ribs, that in each of the defendants' devices and in each of the plaintiff's devices you find that the spacing of the ribs is such that they define a spiral having a greater helical angle than that formed by the convolutions of the conduit?

Mr. Welsh: I object to that as calling for a con-

(Testimony of R. S. Berry.)

clusion of the witness, your Honor. I think the evidence speaks for itself.

The Court: I never allow an expert to answer that question.

The Witness: Thanks.

The Court: And Mr. Berry has been here, as he said. Ever since I became a judge, I drew the line on that, and I even gave a lecture which was published both in the Patent Journal and in the Bar Association Journal, to the effect that if we let him answer that question, we are asking him to decide what I am to decide. [68]

Mr. Mason: I recall that, your Honor.

The Court: And even if he were a scientist, I do not allow it, but a man who is a patent lawyer is an advocate. He is not a scientist. He is defending the device. The more he sticks to facts, the more likely I am to follow him, and when he gets into the realm of opinion he is invading my province.

Q. (By Mr. Mason): Mr. Berry, in the devices of Exhibits 26, 27, and 28, on the drawings I notice that you show the ribs as being disposed at a slightly lesser angle to the major axis of the coupling than a right angle. Does that have any difference in the function of the devices?

Mr. Welsh: I object to that, your Honor, as calling for a conclusion of the witness; That is for the court to determine, whether or not that angle makes any difference in the means of operation of the two devices.

The Court: I think he can describe them and let

(Testimony of R. S. Berry.)

me draw the inference as to whether their function is the same or not.

The Witness: You are referring now, I take it, to the defendants' MS coupling?

The Court: Yes, just describe how it functions in contrast to the plaintiff's device.

Mr. Mason: To make it clear, please point out that on Exhibit 26, for instance, on the plaintiff's device. [69]

The Witness: No. The defendants'. Pardon me. On the plaintiff's, right.

Q. (By Mr. Mason): You have the ribs disposed strictly at a right angle to the longitudinal axis of the coupling? A. Correct.

Q. Whereas, on the defendants' device there is a 3.5-degree difference? A. That is right.

In each of the MS couplings of the defendants, on Exhibits 26, 27, and 28, the ribs extend at slightly angular relationship to the longitudinal axis of the coupling.

On Exhibit 26 that angle is approximately 3.5 degrees.

In Exhibit 27, on the $\frac{3}{4}$ -inch conduit, at a 2-degree or approximately; and in Exhibit 28 it is approximately 3 degrees.

Now, those degrees are relative to the perpendicular struck from the longitudinal axis.

Mr. Welsh: I think the witness misstated. On Exhibit 28, on my copy, it indicates 5 degrees.

The Witness: Pardon me?

Testimony of R. S. Berry.)

Mr. Welsh: On my copy of Exhibit 28 it says 5 degrees.

The Witness: 5 degrees, that is right. I stand to be corrected.

Now, I have found by demonstration here where I have had these exhibits in my possession for the past week and put [70] them together and took them apart time and time again, that there is no difference in the action, the reason for it being that the angular relation of the rib does not alter its helical angle struck from centers.

The only possible difference in the action—the mode of operation is identical, but in the action, by reason of the rib being at an angle, its leading edge, as compared with one that is perpendicular, could possibly meet with the wall of a convolution of the spiral, let us say, a moment sooner, quicker.

The Court: That is true. Let us stop right there.

In other words, that would be true of almost any kind of a spiral?

The Witness: That is right.

The Court: In other words, when you thread, you of necessity thread an angle, isn't that true?

The Witness: But in a thread——

The Court: In an ordinary thread.

The Witness: In an ordinary thread the pitch is at an angle.

The Court: And what this inventor claimed and what he exhibited here is a departure from the ordinary thing, whereby, by spacing these——

The Witness: Ribs.

(Testimony of R. S. Berry.)

The Court: ———ribs, by spacing these ribs, he caught [71] every alternate one instead of a straight one.

The Witness: That is right.

The Court: And he demonstrated it on Figure 8.

The Witness: That is right.

The Court: In other words, he claimed a departure in plaintiff's coupling?

The Witness: That is right.

The Court: As soon as you go back to a tool such as the accused device, you are back in the same kind of situation as you have in an ordinary fitting tool, tube, by taking two pipes and putting them together and fitting them and joining them, isn't that true?

The Witness: I am going to take these, Judge. I think you have a little misconception.

The Court: No, I have not a misconception. I am looking at the disclosure of Figure 8.

The Witness: You are talking about the plaintiff's here?

The Court: The plaintiff's, yes.

The Witness: What I am getting at by testifying is the fact that by tilting this rib slightly across here (indicating) it is not changing the action of that rib.

The Court: That doesn't make any difference, but the only thing he got, the only claim he got is a departure from the ordinary thing. They wouldn't have given him a claim [72] on something which you can create any time by taking a piece of pipe

(Testimony of R. S. Berry.)

and making your own thread with a threading machine.

The Witness: That is right, but may I point out, your Honor, that the claim calls for the rib being substantially perpendicular to the axis of the conduit.

The Court: Yes.

The Witness: And I am presenting the argument here——

The Court: I am glad you call it argument.

The Witness: I call it an argument because it sound like it.

The Court: An angle is not a perpendicular.

The Witness: Well, that is right. But from 2 degrees to 5 degrees, I would say, is substantially perpendicular. As long as it doesn't change the function or the action, the mode of operation becomes the same.

The Court: All right, go ahead.

The Witness: That is what I ascertained here, was the fact that while this angle that we are speaking of now is what we might call the pitch of the ridge of the defendants' device, and that pitch ranges anywhere from 2 to 5 degrees relative to the perpendicular, its action or its function is exactly the same as if it were perpendicular, for the simple reason that it threads into the channel of the conduit in exactly the same way and effects exactly the same engagement.

Q. (By Mr. Mason): And on Exhibit 25 the rib is disposed [73] perpendicular to the major axis

(Testimony of R. S. Berry.)

of the coupling, is it not? A. That is right.

Q. There is no spiraling or angling there?

The Court: Well, why do you draw the lines at 5 degrees? Supposing he made them at a greater angle than under your interpretation of the claim, anything that you can put in there, no matter whether it follows the teaching of the figures here or whether it is at an angle which engages tightly any kind of thread, would read upon this claim, wouldn't it?

The Witness: Well, no, I don't quite get that picture, your Honor.

The Court: Well, I don't get it either from this line, but I get it from your testimony.

The Witness: What I am trying to get at here is that the angle that we are speaking of now is not the helical angle. It is the angular relationship, the longitudinal length of that rib to the perpendicular, and is not critical.

The Court: That isn't the point. The point is this, that what he is doing is introducing a right angle which is irregular and which, by skipping, as he has demonstrated on Figure 8, is going to catch one of these threads.

The Witness: That is right.

The Court: Which are the ordinary threads.

The Witness: That is right. [74]

The Court: And as soon as he gets back to an angular thread he is in the domain of an ordinary plumber who can fix his pipe, make his threads and couple them together, and doesn't have to worry about any invention.

(Testimony of R. S. Berry.)

The Witness: Yes, that would be true, your Honor, if the angle——

The Court: If my voice is crisp, I might state that I am at the tail end of cold.

The Witness: That would be true, your Honor, if you are referring now to what is known as the helical angle, which would be the pitch of a thread, but this has nothing to do with the pitch of a thread. It is not given that angle in the defendants' device for the purpose of making the spiral thread.

The Court: But the claim says, "said ribs being sequentially disposed in staggered relation along the outer surface of the conduit-engaging portion of said coupling so as to define a spiral having a greater helical angle than the normal helical angle of the convolutions of the conduit."

The Witness: That is right, but that is not the angle that we are talking about.

The Court: What angle are you talking about?

The Witness: May I take one of the exhibits?

The Court: I don't know what you are talking about. I am talking about the claim. You infringe a claim, you do [75] not infringe a description.

The Witness: We want to get on common ground here,——

The Court: All right.

The Witness: ——so we know we are both talking about the same thing and not for the sake of argument.

The Court: Yes.

(Testimony of R. S. Berry.)

The Witness: This is an angle, right across here (indicating), relative to the end of this conduit.

The Court: That is true.

The Witness: All right. Now, that angle continued out across here (indicating) would not convert this into a thread.

The Court: Well, unless they were measured as the other is.

The Witness: As you look at it, it might appear that way, but if you put the instrument on there, you will find that those threads will not meet.

The Court: Well, it doesn't make any difference. Supposing you made a picture of this, it certainly would not correspond with this picture, Figure 8.

The Witness: I will show you what it would do.

The Court: What would it do?

The Witness: It would show this inclined just a little bit farther over this (indicating), say like that (indicating), but not necessarily. I will mark it with a little red there. It just inclines it but it doesn't change the relative [76] spiral arrangement relative to the spiral of the conduit at all.

The Court: Then, of course, this last portion——

The Witness: Yes, that refers to the helical angle.

The Court: The helical angle?

The Witness: That is right.

The Court: And that would not apply to the accused device at all?

The Witness: Oh, yes.

The Court: How would it apply?

(Testimony of R. S. Berry.)

The Witness: That helical angle is exactly the same.

The Court: Why?

The Witness: Because the helical angle is measured from the centers diametrically opposite, not from the ends.

If you measure this from the ends here, you get one angle right across here (indicating), see.

The Court: Yes.

The Witness: The actual helical angle is measured from the center of the rib here to the center of the rib over here (indicating), and that is not on a spiral. It looks like a—this is what we call a calculus variation.

The Court: You can't continue this line direct without its continuing to have a deviation at an angle, if you did it a thousand times.

The Witness: Well, let me see if I can make it clear [77] here. If I were to lay a ruler across the lower edge of this here (indicating) and carry it around here (indicating), it wouldn't line up with this (indicating). In other words, there would be an angle here.

In other words, this isn't what we commonly call an interrupted thread. We have interrupted threads in the art here, but the defendants' device is not an interrupted thread, because this rib does not extend upon a true spiral with relation to this rib here (indicating). If one of these ribs was continued on around, it would probably extend alongside the other one, but it would not be in spiral

(Testimony of R. S. Berry.)

alignment with it. In that respect it is not a spiral like a screw thread.

The Court: Go ahead. I was just sending for something to measure it.

Q. (By Mr. Mason): Will you point out on each of these drawings the line which you have used to denote the helical angle?

A. In Exhibit 25, on the $\frac{3}{8}$ -inch DH coupling and also on the $\frac{3}{8}$ -inch MS coupling, it is designated by broken lines here. I will indicate them by the capital letter "B" in both instances, because they are the same (marking on exhibit).

While you did not ask it, the same is true in each of the other exhibits, Nos. 26, 27, and 28, the broken lines, [78] they go diagonally from the base and the peak respectively of the ribs.

Now, those broken lines are taken on centers at diametrically opposite sides of the cylinder.

Q. Now, let me ask you this. You will notice that in the plaintiff's coupling the ribs are disposed at right angles to the major axis of the coupling, whereas, in the accused coupling, it is about at a 3.5 lesser angle. Does that make any difference in determining the spiral, the helical angle to which you have referred? A. Not at all.

Q. If those ribs in either the plaintiff's or the defendants' devices were spaced apart a distance so as to define a helical angle which was the same as that of the conduit, would it effect any binding action?

A. No more than just the normal surface fric-

(Testimony of R. S. Berry.)

tion. There would be no so-called binding or locking action as is demonstrated here.

Q. If you were to continue the ribs around the full circumference in the form of a spiral, and the spiral was greater than the helical angle of the conduit, could you insert the connector into the conduit?

A. They would not intermesh. You could not insert the coupling into the spiral, if I get you correctly.

Q. So that, in order to get a helical angle which is [79] greater than that of the conduit, you would have to make the ribs shorter than the full circumference of the connector?

A. That is right. In other words, spaced apart at their ends.

Mr. Mason: That is all. You may cross-examine.

The Court: Just a minute before you continue here. Let me see the device, the accused device.

The Witness: That is it.

The Court: All right. Here is a straight-edge, a measure, a small ruler, a 6-inch ruler. I wish you would measure the distances on this device to the edge on both sides, and tell me the distances, and then I will ask you a question how in the law of mathematics you can call this substantially a right angle. I tell you what the final question is so you will know what I am driving at.

(The witness illustrates.)

The Court: That may not be——

(Testimony of R. S. Berry.)

The Witness: That is pretty close, your Honor.

The Court: What is that?

The Witness: This is $\frac{3}{16}$ of an inch.

The Court: All right, and the other one?

The Witness: On the other one, I will reverse it, and we get approximately a little over $\frac{1}{4}$ -inch, I would say that it is about $\frac{9}{32}$ -inch.

The Court: And would you say that that is put there at [80] substantially a right angle?

The Witness: Well, that word "substantially" has a certain amount of latitude.

The Court: No. I know what "substantially" means. "Substantially" means in effect.

The Witness: In effect, yes.

The Court: "Substantially" may allow for a variation of .001 per cent.

The Witness: That is right.

The Court: All right.

The Witness: And the effect is the same.

The Court: I am not talking about the effect. Would you say that that is substantially at a right angle?

The Witness: I would say that that is substantially at a right angle.

The Court: That is in your language, not in mine. Not in mine, sir.

All right, go ahead.

Cross Examination

Q. (By Mr. Welsh): Mr. Berry, did you ever conduct any experiment to determine exactly what

(Testimony of R. S. Berry.)

happens to these ribs on the inside of the conduit and the result from pressure?

A. Only by hand, as by screwing them together and separating them. [81]

Q. Did you ever in doing that notice that on the patented device the markings are on the edge, and on the accused device the markings are all on the surface? Did you ever notice that?

A. In the particular exhibit that we have in front of us here, those have been screwed out and in, time and time again, and naturally will leave some markings on it.

Q. Wait a minute. The accused devices have been screwed in just as many times as the patented device.

A. Yes. I worked them, I worked them both.

Q. You hadn't particularly noticed that, then?

A. Surely.

Q. Oh, you have? A. Yes.

Q. Did you ever dye any of these devices and then notice it?

A. I contemplated using prussian blue on them but didn't get around to it. I didn't have time. I didn't.

The Court: You can screw them together and, by sawing them across, find out where they meet?

Mr. Welch: We have some evidence on that, your Honor. There is a Jake device that is in evidence here, and I don't want to put this in evidence. There is another Jake device that is in evidence.

The Court: I don't want any more exhibits.

(Testimony of R. S. Berry.)

Q. (By Mr. Welsh): Now, looking at this Jake device here, you have a device that has continued threads that are presumably meant to mesh with the convolutions of the conduit, is that correct, sir?

A. That is right.

Q. Now, in this case, in that Jake device, this helical angle is identical with the angle of the so-called rib, isn't it?

A. That is right. Wait a minute. You said "rib."

Q. Well, thread? It is a matter of terminology. Let us say protuberance.

A. I just don't want to be mistaken here in my answer. That does not have the same angle as the ribs of the exhibits here.

Q. No, I appreciate it doesn't have the same.

A. But it does have the same angle as the convolutions of the conduit.

Q. Yes, and the helical angle of these threads or protuberances is the same as the angle of the protuberance, is it not? A. No.

Q. Well, wouldn't it be just a continuation? For instance, supposing I were to mutilate this Jake connector, then you would have something similar to what you have here, in the sense that you would have an interrupted thread; [83] wouldn't the angle of the protuberance be the same as the helical angle?

A. Oh, yes, in so far as these particular threads are concerned, but not in connection with those.

Q. Oh, no, they would not be the same as these.

(Testimony of R. S. Berry.)

A. We had one over there where I had Mr. Horton sever those threads. I demonstrated that.

Q. All right.

A. I did that very thing, sir. I had those threads mutilated, and it didn't change the operation a bit in so far as the operation of the Jake connector is concerned.

Q. My only point is that when you do that, then the angle of this protuberance of the Jake connector is the same as the helical angle of the Jake connector.

A. That is right, I will agree with you.

Q. Yes, so that the angle at which this is disposed has something to do with the helical angle, does it not?

A. Well, it is a continuation.

Q. Surely.

A. It makes a screw and it is in spiral alignment.

Mr. Welsh: That is all. I don't have any more questions.

The Court: Do you have any other questions?

Mr. Mason: That is all.

The Court: I think we will take a short recess.

(Recess.)

The Court: All right. Call your next witness.

Mr. Mason: I offer in evidence Plaintiff's Exhibits 24 to 28, for the purpose of illustrating the testimony of Mr. Berry.

The Court: They may be received.

The Clerk: Exhibit No. 24 is already in evidence.

So there will be Exhibits 25, 26, 27, and 28 in evidence.

The Court: All right.

(The drawings referred to, marked Plaintiff's Exhibits Nos. 25, 26, 27, and 28, respectively, were received in evidence.)

[See Book of Exhibits.]

Mr. Mason: I wish to place in the stipulation that we have arrived at, that the devices of the defendants which have been placed in evidence were made and sold by the defendants subsequent to the issuance of the patent in suit and prior to the institution of this action, that is, those devices or equivalent devices.

Mr. Welsh: With one exception which I discovered after speaking with you, Mr. Mason. The $\frac{3}{8}$ -inch, the very small one, was made but was not sold. I have in my possession and will introduce it, or counsel for plaintiff may, a $\frac{3}{8}$ -inch device which was sold subsequent to the patent and prior to the litigation. The one that is in evidence was experimental and was not sold on the market.

Do you want to substitute this or put this in evidence? [85]

Mr. Mason: No. I do not.

I will call Mr. Friedman.

Mr. Welsh: With the exception of that, your Honor, the stipulation stands as to all other exhibits.

The Court: All right.

SAMUEL W. FRIEDMAN

called as an adverse witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: What is the name, please?

The Witness: Samuel W. Friedman.

Direct Examination

Q. (By Mr. Mason): Mr. Friedman, I show you Exhibit No. 17 and ask you if you made or sold any of those subsequent to July 5, 1949.

A. No. We did not manufacture or make them prior to that time.

Q. I said, subsequent to July 5, 1949, did you make or sell any devices as shown by Exhibit No. 17?

A. I said we did not manufacture them in that time.

Q. Well, did you sell any?

A. No. We did not make them. We didn't sell them.

Q. When did you make and sell a device of Exhibit 17?

Mr. Welsh: I object to that as a compound question, your Honor. He is asking him two questions.

Q. (By Mr. Mason): When did you first make a device of [86] Exhibit 17?

A. Sometime in '51.

Q. And when did you first sell a device as shown in Exhibit 17?

A. That was made several months later.

Q. Several months after '50, later?

A. In 1951.

(Testimony of Samuel W. Friedman.)

Mr. Welsh: Will you read the question and answer?

(Record read.)

Mr. Welsh: That was not responsive, that it was made several months later. The question was, When did you first sell a device such as in Plaintiff's Exhibit 17?

The Witness: Sometime in '51.

Mr. Mason: Then do you wish to enter into the stipulation that I proposed with respect to this Exhibit 17, counsel?

Mr. Welsh: Well, I would like to ask just a few questions, just to make sure that I have the witness' testimony.

Cross Examination

Q. (By Mr. Welsh): Mr. Friedman, Exhibit No. 17, did you ever sell that device or one just like it?

A. One just like it or similar to it.

Q. Now, I show you a device which is not marked as an exhibit, and ask you if that is the same as Exhibit No. 17, or if that is a subsequent product. [87]

A. Well, of this first one, Exhibit 17, we originally made samples, around approximately a hundred, and passed them out.

Q. Did you sell them?

A. We did not sell them. We gave them out as samples. Then we came out with this one later and we did sell this one in my hand.

Q. Now, the question counsel asked you is

(Testimony of Samuel W. Friedman.)

whether you sold, which means you got compensation for their sale.

A. No, I did not, not Exhibit No. 17.

The Court: All right. Are you satisfied with the record, or what?

Mr. Welsh: I am satisfied with it, yes, sir.

The Court: I do not think it is of any great importance at this stage of the case.

Mr. Welsh: Well, we have one that was sold.

The Court: All right.

Mr. Mason: Well, if your Honor please, this one differs from the others of the defendants' devices in that the ribs are disposed normally to the major axis identical with the patent, whereas the others have the slight——

The Court: Well, if he made them experimentally and then threw them away and did not use them, there is no infringement. A man may putter around, but if he doesn't put them in commerce, he doesn't do you any harm. [88]

Mr. Mason: He has testified that he made them and handed them out as samples.

The Court: As samples. That is not a sale. Counsel, I will let you argue the effect later, if you want to, but I think the testimony is uncontradicted.

All right. Is there anything further with this witness?

Mr. Mason: That is all with this witness.

The Court: All right. Step down.

Mr. Mason: Mrs. Horton.

The Court: What is the object of putting Mrs.

Horton on? I assume that most of her testimony is going to be along the same lines. What is the object of putting her on?

Mr. Mason: There was some mention this morning of marking some of the earlier devices with the serial number of the patent application instead of the patent number.

The Court: Let me take a look at it. I think I will dispose of that. The man has a right to say that he has a patent application pending, number so and so, without being charged with fraud, and there is no charge of fraud in securing it. I can dispose of that very quickly. Let me see what it says.

Mr. Mason: There is a letter from Mr. Stratton to my client, the plaintiff, and their reply dated March, 1950.

The Court: Well, where is the first? What is this?

Mr. Welsh: That is reply to the letter underneath, [89] your Honor.

The Court: What has this got to do with this lawsuit?

Mr. Welsh: Well, I don't think at this stage of the game it has anything to do with it.

The Court: All right. Then I will sustain the objection.

I will also say that for a claimant to give the patent application number on a device before a patent is issued is perfectly legitimate. In fact, it shows good faith, because, under the law, he is required merely to say "Patent pending." By saying "Patent pending" and giving the number, he allows

the world to know that he has an application pending which has that number, and, instead of showing bad faith, it shows good faith.

Furthermore, even if a man made a mistake by giving a patent application number instead of a patent number, it would not be a defense, and even if you pleaded the defense of unclean hands, it wouldn't be unclean hands.

So I am not interested in what you gentlemen, as advocates representing your clients, told them.

If that is all there is to the issue, I will say it is trivial and I would not take it into consideration at all as involving any unclean hands.

Mr. Mason: I just didn't want an inference.

The Court: All right. [90]

Mr. Mason: I think that concludes my case in chief.

The Court: All right.

Mr. Mason: The plaintiff rests.

(Whereupon the plaintiff rested its case in chief.)

The Court: You may put on your proof.

Mr. Welsh: I would like to move for a dismissal at this time, your Honor, on the grounds that the claim of the patent discloses that the ribs must be substantially at right angles, and the evidence shows that the accused device does not have ribs substantially at right angles; the art is old; the claim should be narrowly construed, and we do not believe that a prima facie case has been made.

The Court: The motion is denied. I prefer to

decide this case upon issues of fact rather than upon a motion of this character.

(Whereupon the defendants to maintain the issues on their behalf offered and introduced the following evidence:)

Mr. Welsh: Mr. Friedman, will you please take the stand?

SAMUEL W. FRIEDMAN

called as a witness on behalf of the defendants, having been previously duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Welsh): Will you state your full name, sir?

A. Samuel W. Friedman. [91]

Q. And your business address?

A. 814 East 29th Street.

Q. Are you in any way connected with the defendant M. Stephens Mfg. Company?

A. Yes. I am president.

Q. For how long have you been president?

A. Approximately eight years.

Q. Now, several exhibits were introduced into evidence other than Plaintiff's Exhibit 17 which you testified to before, which are exemplary of devices purportedly made by your concern. That was stipulated to.

Can you tell me when you started your operation, when you started making up those devices?

A. Sometime in about March of 1951.

Q. And have you sold them on the open market since then? A. Yes.

(Testimony of Samuel W. Friedman.)

Q. Now, in manufacturing your device, is your device intended to perform any particular function? In general first.

A. It is used to hold the flex in place into the box.

Q. All right. Can you briefly describe its principle of operation, how it does the job?

A. It is a screwing action, and we screw it into the flex.

Q. And then how does it stay in, how do you keep it [92] from slipping?

A. Well, it is tightened so that the flex hits the shoulder of the connector. That is what holds it.

Q. By "the shoulder" do you mean the top part of the connector?

A. That would be the bottom part of the connector or the shoulder, as it is called.

Q. Before making your device were you familiar with the so-called Hunter patent, which is the Jake device? A. Yes.

Q. Had you seen it in operation and used it?

A. Yes.

Q. Now, the ribs on your device, when you first started manufacturing your device, were your ribs similar to the ones that are in evidence? I think there are some in front of you here. That is another one. Here is one.

Now, this is Plaintiff's Exhibit No. 20. You will notice that the protuberances here, ribs, are somewhat raised. Is that the way they were?

A. That is the way we made them originally.

(Testimony of Samuel W. Friedman.)

Q. And for what purpose?

A. They got a better grip.

Mr. Mason: Is that the Jake device?

The Witness: No, no, sir. That is the accused device.

The Court: Oh, the accused device. It is difficult to [93] keep track of them, and that is why I want to know what you are talking about. All right. Go ahead.

Q. (By Mr. Welsh): Do you know of your own knowledge how many degrees, if any, off the horizontal the ribs on your device are disposed?

A. About $31\frac{1}{2}$ degrees off the horizontal.

Q. And does that as a matter of practice make for easy fitting and easy usage?

A. To our knowledge. To the best of our knowledge.

Q. And you have always marked yours with a distinctive marking, have you?

A. You must, according to Underwriters. All items that are Underwriters-approved must have identification. We have.

Q. And that is with the letters "MS", is that right?

A. That is correct.

Q. It has been testified to, but I ask you if this is true, that the coupling is made of zinc, whereas the flex is made of steel, is that right?

A. That is correct.

Q. And I assume that steel is harder than zinc.

A. That is correct.

Q. What effect, then, does it have on the coup-

(Testimony of Samuel W. Friedman.)

ing or on the steel, if any, when you screw in your device?

A. Well, if you would have any rough edges on your [94] connector when you screw it in, it will take them off, it will take off those rough marks, off of the zinc. The steel is stronger.

Q. You mean it would have the effect of rubbing some of the metal off of the coupler, is that right?

A. That is right.

Mr. Welsh: Pardon me for a moment.

The Court: All right.

Q. (By Mr. Welsh): Then, since the metal of the coupler is softer than the metal of the steel, would the coupler ream out the flex?

A. No, sir. It couldn't ream out the flex. The flex would ream the connector, if it had those rough parts on it, as it is turned, as it is screwed in, and when you take it off, because the flex is stronger. A lot of times in die-casting they have unfinished parts.

Q. In the plaintiff's patent he states that his device is for the purpose of twisting, in effect, the twisting of the metal of the conduit. Is that the effect that your connector has in the conduit?

A. Ours has just the reverse.

Q. What do you mean by that?

A. His connects and jams. It pushes it together, and ours pulls it apart.

Q. Your pushes it apart? [95]

A. That is right, from behind.

Q. Now, then, if you had flexible cylinders and

(Testimony of Samuel W. Friedman.)

connected their heads up and pushed toward the outer edges, that is the effect?

A. That is right.

Q. And that is why you have the high protuberances?

A. That is the reason for them.

Q. Would it be a fair statement, to paraphrase what you have said, to say that while theirs stretches lengthwise, yours expands?

A. That is correct.

Q. Now, at my request did you bring with you a junction box, a piece of flex, and a Jake connector?

A. That is correct.

Q. And did you put those together?

A. I did.

Q. I hand you this piece of metal and ask you if that is the junction box, the Jake connector, and the flex.

A. That is correct.

Q. Now, would you please take it apart and put it back together for the benefit of the court? That is the Jake or Hunter patent.

A. May I use their pliers?

The Court: Yes.

Mr. Welsh: Could we borrow your pliers? [96]

Mr. Mason: Yes.

Mr. Welsh: This is the prior art, your Honor.

(The witness illustrates.)

The Witness: You better take it.

Mr. R. J. Horton: My hands are slippery. I will get the other pliers. There is a certain way on that. There is a little trick to it, I will assure you.

Testimony of Samuel W. Friedman.)

The Court: All right, let us have the other pliers.

(Mr. Horton disassembles device.)

Mr. Horton: This is the little trick.

The Court: Let us not take the time to show little tricks. You can show them later.

Q. (By Mr. Welsh): Now, that is the Jake or Hunter patent, is that correct?

A. That is correct.

The Court: All right.

Q. (By Mr. Welsh): Now, will you assemble it together with the junction box, for the purpose of illustration?

(The witness illustrates.)

The Court: All right. Go ahead.

Mr. Welsh: I would like to introduce that into evidence.

The Court: It may be received.

The Clerk: Defendants' Exhibit B in evidence.

(The apparatus referred to, marked Defendants' Exhibit B, was received in evidence.) [97]

Mr. Mason: I object to it on the ground this has not been properly proved, your Honor, if it is offered as a prior use or if it is offered as being exemplary.

The Court: He is demonstrating the prior art.

Mr. Mason: Well, I mean he hasn't qualified this man as an expert to state whether or not that is the Jake patent. He has pleaded the Jake patent as prior art, but he hasn't—

Mr. Welsh: Wait a minute. We have an exhibit.

The Court: Well, we assume that people are

(Testimony of Samuel W. Friedman.)

honest. This bears the name or number—where is it?

Mr. Welsh: It is probably under the coupler, your Honor.

The Witness: No. It is on top. It says "Jake" on it.

The Court: What?

The Witness: May I show it to you?

The Court: It hasn't got that number.

The Witness: Yes, it is right here. It says right on there "Jake," that is, it says a "Jake connector."

The Court: Yes, but it doesn't have the name or number of the patent. If it is the Hunter patent, the number isn't on it.

Mr. Welsh: Well, the Jake is in evidence. They can compare it.

The Court: All right, let us take the one that is admittedly in evidence, so there won't be any question.

Mr. Welsh: Does counsel make any contention that that [98] isn't a Jake?

The Court: He says he doesn't know. It is marked "Jake."

Let us use theirs. That is the same, "Cat BC-050." All right.

Mr. Stratton: The Jake patent—

The Court: All right, gentlemen, you know me, I don't like to get off onto a lot of side details.

Take this Jake patent device, this one that is marked Plaintiff's Exhibit No. 12, and do the operation you did a while ago on this box.

(Testimony of Samuel W. Friedman.)

The Witness: Shall I take off the string?

The Court: No. Well, I will have the clerk take it off and put it back so he can identify it later on.

Mr. Welsh: While this is going on, your Honor, may I introduce into evidence, with counsel's permission, the prior art and the file wrapper?

The Court: All right. The prior art will be received as Defendants' Exhibit C, and the file wrapper will be received as Exhibit D.

(The documents referred to, marked Defendants' Exhibits C and D, respectively, were received in evidence.)

Mr. Welsh: The prior art is Exhibit C, is it, your Honor?

The Court: Yes. And the file wrapper is Exhibit D.

The Witness: All I am doing is inserting the connector [99] into the flex.

The Court: And you are using—what is that, Plaintiff's Exhibit 12?

The Witness: That is correct.

The Court: And you are inserting it into the box which you produced?

The Witness: The junction box, which is the normal use of it.

The Court: All right. We are used to talking for the record and you are not, you see.

The Witness: (Illustrating) There you are, sir.

The Court: All right.

Mr. Welsh: Now, we could demonstrate how it is opened, although that has already been done, but

(Testimony of Samuel W. Friedman.)

we could demonstrate how it is opened up and whether it is necessary to take pliers to do it.

The Court: Well, go ahead.

Q. (By Mr. Welsh): Will you take the exhibit apart?

A. Well, you use pliers when you tighten this, no matter whether you use his or anyone else's, because when they test it—I can loosen this by hand, but if I had the pliers I could tighten it so I couldn't take it off. I can take it off over here, off the nut.

Q. Now, can you take it off of the flex?

A. No, I can't. [100]

Q. In other words, you would have to use a pliers to take it off the flex?

A. That is correct.

The Court: And the reason for that is that you do not have a correspondence between these grooves such as you would have if they threaded two pieces of pipe and fitted them together, isn't that true?

The Witness: That would be approximately that, I believe.

The Court: I am not a plumber, but I do a little work occasionally around the house. But if you took two pieces of pipe and threaded them——

The Witness: They would have the same action.

The Court: All right. And then, if you tightened them, the chances are that when you tightened them by hand, you could unscrew them by hand, because they are even, isn't that true?

The Witness: Yes.

(Testimony of Samuel W. Friedman.)

The Court: But because these are uneven, they get wedged in such a manner that, in order to unscrew them, you need a stronger instrument than your hand, is that it?

The Witness: Yes, sir.

Mr. Welsh: That is the Jake patent.

The Court: Well, we will restore the parts.

Mr. Welsh: It goes in the junction box first, Judge. [110]

The Court: No. You have demonstrated them. If you are going to separate them now, you are going to take this back and then mark the junction box as your exhibit. And this is No. 12.

The Witness: That is No. 12. They didn't want to use ours.

The Court: This is No. 12.

Mr. Welsh: Very well, sir.

The Court: Which you have used merely on Exhibit E.

Mr. Welsh: On Exhibit E, the junction box.

The Court: Restore that. That is Exhibit 12 that you have in your hand.

Mr. Welsh: No. Leave it together.

The Court: You want it left together?

Mr. Welsh: Yes.

The Clerk: Yes, but I have to——

The Court: You have Exhibit 12 already.

The Clerk: The junction box is already Exhibit B. It is already admitted as B, your Honor.

The Court: All right. I didn't remember that.

(Testimony of Samuel W. Friedman.)

Let us go on, gentlemen. It is getting to 4:00 o'clock.

Mr. Welsh: Just a moment, your Honor.

The Court: Let me ask you this question:

You have continued to sell these devices——

The Witness: Connectors. [102]

The Court: ——connectors, to the present time?

The Witness: Yes, sir.

The Court: All right. I just want to bring us up to date.

Mr. Welsh: Your Honor, we have one more witness that we may use. We don't have him in court.

The Court: That is all right. This man has not been cross examined yet.

Mr. Welsh: That is true, but I just want to explain, in case we should run out of witnesses today, I want the court to know that we have one more witness.

The Court: We will have to come back tomorrow anyhow. We will adjourn at 4:30, no matter what stage we have reached, because I would want to hear your arguments, and I am not going into them tonight. We are not crowded, and if we finish with this witness tonight, we will adjourn then, because Mr. Goodwill, the reporter, has to fly to Fresno tonight to be ready to take over court there tomorrow morning. So we will finish with this witness and then we will take our adjournment until tomorrow morning at the usual time. Then we will complete the testimony and then I will hear whatever arguments you desire to present.

(Testimony of Samuel W. Friedman.)

I have read the memoranda you have filed and I am familiar with the positions that both of you take. By eliminating unfair competition it is reduced to a simple issue [103] as to whether there is infringement.

All right.

Mr. Welsh: No further questions.

The Court: All right. Go ahead, Mr. Mason.

Cross Examination

Q. (By Mr. Mason): Mr. Friedman, are you familiar with the Underwriters' rules?

A. Pertaining to what, sir?

Q. To this flexible tubing.

A. To the extent only that there are allowances of so much one way or another.

Q. Well, you know, do you not, that this piece of tubing on which the Jake connector has been inserted, Exhibit 12, is an undersized piece of tubing?

A. It is what, sir?

Q. An undersized piece of tubing.

A. It is not undersized. That was standard flex that was bought at General Electric. Now, we will put in a half-inch connector and see if it is undersized on this other side. (Witness illustrates.) There is nothing undersized about that, sir.

Q. Are you familiar with the use of the so-called "go and no go" gauge in measuring?

A. No. [104]

Q. You are not? A. Definitely not.

Q. Do you know, Mr. Friedman, what causes

(Testimony of Samuel W. Friedman.)

your connector to lock after it has been inserted in the conduit?

A. Yes, the raise, in the high bumps. The bumps on the connector.

Q. Does what?

A. Causes it to expand.

Q. It causes it to expand by engaging the convolutions?

A. The convolutions of the flex.

Q. And causing the raise to pull apart?

A. To raise them, yes.

Q. Well, in order to raise them up, you have to pull them apart?

A. You raise them first and then it pulls them apart.

Q. So it is a simultaneous operation of raising them and pulling them apart?

Mr. Welsh: That isn't what the witness said.

The Court: Let us not do that, Mr. Welsh, please. What did you say?

The Witness: It raises the flex; in other words, it causes it to go up because of the high bumps on the connector—the size of the bumps.

The Court: All right. Then, as you tighten it——

The Witness: It raises it; that is all it does.

The Court: All right.

Q. (By Mr. Mason): Isn't it a fact that the spacing of the ribs on your device which defines a spiral greater than the helical angle of the convolution of the conduit plays an important part in effecting this raising, as you call it?

Testimony of Samuel W. Friedman.)

The Witness: Would you repeat the question again?

The Court: You dropped your voice, Mr. Mason, so it is difficult for me to hear you.

Did you get the question, Mr. Reporter?

The Reporter: Yes, sir.

(Pending question read.)

A. That would be an assumption on my part.

The Court: Well, if you can't answer it, it is all right.

Q. (By Mr. Mason): You are not an engineer, however? A. No, sir.

The Court: How did you get into this business, in plumbing or what?

The Witness: From the hardware and wall plates and wiring devices.

The Court: All right.

Q. (By Mr. Mason): You had seen the plaintiff's devices before you started making this accused device, had you not? A. Yes. [106]

Mr. Mason: That is all.

The Court: Is there any redirect?

Mr. Welsh: No redirect, your Honor.

The Court: All right. Step down.

Mr. Welsh: May we adjourn now?

The Court: Let me ask you one question. Before we go on, you have a counterclaim of some kind. What is that?

Mr. Welsh: That counterclaim was also for unfair competition.

The Court: I see.

Mr. Welsh: A counterclaim similar to the one that was dismissed.

The Court: Yes.

Mr. Welsh: We are disregarding that. We are not going to put any on.

The Court: You are not going to put any on. That eliminates that.

Very well, gentlemen. We will stage our adjournment until 10:00 o'clock tomorrow morning. [107]

* * * * *

Los Angeles, Wednesday, Jan. 6, 1954, 10:00 a.m.

The Court: All right, gentlemen, cause on trial.

Mr. Welsh: I would like to recall Mr. Friedman to the stand for a couple of short questions.

The Clerk: Your Honor, I am not too sure that Exhibits 23 and 24 were actually ordered admitted. I have them marked as admitted. They are two advertisements, and to make certain, I think we should have an order.

The Court: I will make the order now that they may be received.

The Clerk: Very good, your Honor.

SAMUEL W. FRIEDMAN

recalled as a witness on behalf of the defendant, having been previously duly sworn, testified further as follows:

Direct Examination

Q. (By Mr. Welsh): Mr. Friedman, for how

(Testimony of Samuel W. Friedman.)

long a period of time have you manufactured the accused device?

A. Oh, approximately three years.

The Court: Let me hear that?

The Witness: Approximately, about three years.

The Court: Three years.

The Witness: Close to three years now.

Q. (By Mr. Welsh): During that time have you made any [110] changes in the angle, that is, during the time you have actually been selling them and marketing them commercially, have you made any changes in the angle that the rib makes with the longitudinal axis itself? A. No, sir.

Q. Have you had occasion infrequently or frequently to screw your device into flex of different manufacture?

A. Yes, I have tried them, and test them constantly.

Q. And have you found they enter with ease or with difficulty when you screw them in?

A. With ease.

Q. Assuming you do not tighten them up to the last notch, are they easily removable or not easily removable?

A. They can be removed by hand.

Q. Then from your experience in using and manufacturing these devices, do you have an opinion as to whether or not the helical angle of your device is the same as that of the flex into which it is inserted? A. Approximately the same.

Q. Approximately the same helical angle?

(Testimony of Samuel W. Friedman.)

A. That's right.

Q. Now, have you had an opportunity to examine the prior-art patents which have been introduced into evidence as Defendants' Exhibit C?

A. Yes. [111]

The Court: Now, I will take an extra copy, if you have one.

Mr. Welsh: Yes, sir. I will use the copy myself.

The Court: If he is going to testify to that, I would like one.

Mr. Welsh: I will get you one.

The Court: I will take the exhibit itself.

Mr. Welsh: Your Honor, you can keep this as a working copy.

The Court: All right.

Q. (By Mr. Welsh): Now, referring to the Wilson patent, which is for a threaded coupling, a generic patent for a threaded coupling, have you examined this Wilson patent? A. Yes.

Q. And have you compared it with your own device that you are holding in your hand?

A. Yes.

Q. This is a one-inch coupling, is it not, of yours? A. Yes.

Q. In your opinion, are the threads of the Wilson patent more or less of a degree off the horizontal than yours?

A. They are a less degree.

Mr. Mason: Just a moment. I wish to object to this examination, your Honor, as no foundation has been laid. [112] This man is not an engineer, he

(Testimony of Samuel W. Friedman.)

is not a patent man, and he is using him now supposedly to express an expert opinion.

The Court: As a practical person dealing with structures, I think he can give his opinion by comparing one with the other. Overruled. Go ahead.

Q. (By Mr. Welsh): In other words, then, assuming that yours are $3\frac{1}{2}$ degrees off the horizontal, it is your opinion that the threads on Wilson are less than $3\frac{1}{2}$ degrees off the horizontal?

A. That's right.

Q. Now, referring to the——

The Court: While we are talking about the Wilson patent, will you look at Figure 6?

Mr. Welsh: Figure 6?

The Court: It seems to me that that shows more. There is no indication of scale here, but it seems to me that that is more than a 5-degree angle. Or am I wrong?

The Witness: I am trying to locate Figure 6.

The Court: Wait a minute. Yet, it is Figure 6. Figure 6 on sheet 2, the second sheet of the specifications.

Mr. Welsh: You can answer the court's question, whether or not this appears to be greater than 5 degrees.

The Witness: It is hard to say, just by looking——

The Court: I beg pardon?

The Witness: I couldn't answer that one correctly, [113] Judge, because——

(Testimony of Samuel W. Friedman.)

The Court: There is a way of measuring it, isn't there?

The Witness: Yes, there is.

Mr. Welsh: With a protractor.

The Court: All right, so long as you cannot answer it. It does seem to me, though, that that would show 5 degrees on a 180-degree semicircle.

Mr. Mason: Your Honor please, I wish to call attention to the fact that patent drawings are not necessarily to scale.

The Court: Yes, I know.

Mr. Mason: We have to look to the specifications to find any reference to the degrees, if there are any variants from the normal situation.

The Court: Is there anything in the specifications that indicates the angle?

Mr. Mason: No, your Honor.

The Court: All right. Then, if there isn't, we will just forget it.

Mr. Welsh: Now, just for the purpose of clearing up the record, your Honor:

Q. When I asked you the question before about your opinion as to these angles, what figures were you referring to in the Wilson patent?

A. 18. [114]

Q. You mean line 18? A. Yes.

Q. But what figure of it? A. Figure 1.

Q. Line 18 of Figure 1? A. Yes.

The Court: Well, Figure 6 is an enlarged drawing of line 18. That is the reason why I was asking for it. In other words, if you look at Figure 1,

(Testimony of Samuel W. Friedman.)

There does not seem to be any angularity to them at all at 18, but if you look at the enlarged drawing, there is quite an angle. That is why I was asking. You can see the two of them. Look at 18. It is the same 18, you see, and they use the same figure.

Let's go on. Evidently my question does not help to clarify anything. All the specifications say on page 2, line 18, is that the panels, that is, 17 and 19, "have substantially the same width and taper as the gaps 18' between the panels of the pin."

Mr. Welsh: That is right.

The Court: "Thus when the pin is inserted in the wall 17 the panels 18 will readily enter the gaps 19', and the panels 19 will freely enter the gaps 18'."

In other words, the same situation, skipping one.

Mr. Welsh: Yes, that is right.

The Court: All right. [115]

Mr. Welsh: Now, my intention was to ask the witness the same question pertaining to the Jacobi patent. We probably will run into the same difficulty with it, looking into the scale.

The Court: Which is that?

Mr. Welsh: That is the second to the last.

The Court: Jacobi, 1,973,170?

Mr. Welsh: That is correct, sir.

The Court: All right.

Q. (By Mr. Welsh): Now, directing your attention to line 12 of Figure 1, and line 12 of Figure 2, and comparing those threads in the Jacobi Patent No. 1,973,170 with the threads or ribs on your de-

(Testimony of Samuel W. Friedman.)

vice, is it your opinion that the Jacobi threads form a greater or less degree? A. Less degree.

The Court: The last one is a foreign patent.

Q. (By Mr. Welsh): (Continuing) From the horizontal? A. From the horizontal.

Q. Than the ribs on your device?

A. That's right.

The Court: There is no enlargement there, so you really cannot tell on the Jacobi.

Mr. Welsh: That is true.

The Court: Wait a minute. Oh, no, this is the British patent. [116]

Mr. Welsh: No further questions.

Mr. Stratton: Wait just a moment.

Mr. Welsh: One further thing, your Honor.

The Court: All right.

Q. (By Mr. Welsh): I show you Plaintiff's Exhibit No. 10, which was described as an adapter, and it evidently adapts the plaintiff's device with a steel conduit that is not a flex conduit. Is one end of this adapter—either end of this adapter—suitable for connection with a junction box?

A. I have never seen it used in that way.

Q. Do you know whether or not it can be used in that way?

A. To the best of my knowledge, it cannot be used in a junction box.

Mr. Welsh: No further questions.

The Court: All right, Mr. Mason.

(Testimony of Samuel W. Friedman.)

Cross Examination

Q. (By Mr. Mason): Mr. Friedman, you testified with reference to the helical angle of the conduit with which your connector has been used. Did you actually measure the helical angle or convolution of the conduit?

A. Yes, we had it measured.

Q. Who did it? [117]

A. We had a die man do it.

Q. And which conduit did you measure?

A. We used several different brands, national brands.

Q. Are you capable of measuring the helical angle of the conduit here in evidence?

A. No, I am not.

Q. Do you know which particular piece of conduit your man measured?

A. I said we used several national brands.

Q. Now, you testified about the Wilson patent and the Jacobi patent. You were going merely from the way these appear to your eye?

A. That is correct.

Q. Only to that extent?

A. That is correct.

Q. You have never measured the drawings of the patents? A. No.

Q. And you are not an engineer?

A. No, I am not.

Q. Nor have you had any experience in the interpretation of patents?

A. Not to any great extent.

(Testimony of Samuel W. Friedman.)

Q. When did you say you started manufacturing these devices? In 1951, was it?

A. Approximately. [118]

Q. Approximately what time in 1951?

A. I believe it was sometime in March.

Q. And prior to that time, isn't it true that you telephoned to Mrs. Horton of the plaintiff corporation and attempted to buy the dies of the plaintiff corporation?

A. I have never called Mrs. Horton at any time, for dies or anything else.

Q. Did you have anyone in your organization call Mrs. Horton?

A. No, definitely not.

Q. Do you know it to be a fact from your experience that if you were to make the spiral of the ribs on your connectors to form a helical angle which is the same as the helical angle formed by the convolutions of the conduit, that you would not obtain a locking action of the device in the conduit?

A. Are you referring to the same type of connector with the same type of spirals?

The Court: Or any kind. He has given you a hypothetical question.

Q. (By Mr. Mason): I said "your connectors." I mean such as those in evidence.

A. How are we to change these?

Q. If you had those ribs on your device with a spiral—to define a spiral having the same helical angle as the [119] helical angle formed by the convolutions of the conduit, don't you know it to

(Testimony of Samuel W. Friedman.)

be a fact that you would not obtain a locking action of the connector in the conduit?

A. Well, if I understand you correctly, as I said yesterday, the way our connector operates is from the point that the flex hits the—we will call this the base of the connector, and by tightening it, it hits the base of it, and that is what tightens it.

Q. Well, you haven't answered my question. Will you repeat the question?

A. Then I don't understand it.

Mr. Mason: Would you repeat the question, Miss Reporter?

(The question referred to was read.)

Mr. Welsh: Do you understand the question?

The Witness: No, I don't.

Mr. Welsh: Would you mind rephrasing it, counsel?

Q. (By Mr. Mason): Taking Exhibit 19, for instance, do you know it to be a fact that if the angle, the helical angle, formed by a line drawn from the center of the top rib, top end rib, to the center of the lower end rib, if that angle were the same as the helical angle of the conduit, isn't it a fact that you would not obtain a locking action of the connector in the conduit?

A. I think you could.

Q. Have you ever tried it? [120]

A. Yes.

Q. Where and when?

A. When we experimented with various connectors.

(Testimony of Samuel W. Friedman.)

Q. Did you conduct the experiment yourself?

A. No, I was in on it.

The Court: Of course, it seems to me that when we talk about the helical angle, we are talking about the obvious, because of necessity the helical angle is merely the angle of the spiral, and if you slant them at the same angle, you see, and don't break them and skip, they would not thread. In other words, it is just as though you took one of those simple threaders that you use around the house. As a matter of fact, we have a large place in Hollywood, where we live, and there is so much plumbing in the yard that many a time we go and rent a threader in order to do pipe work. I don't do it myself, but I have seen it done.

Now, in order to make the parts fit, you have got to thread them in the same manner, and, therefore, whether you thread them horizontally or at an angle, they have to correspond, or otherwise they will not lock. It is like doweling in wood. If you have a doweling in wood, you know you have to have a correspondence between the two pieces. You have to have a correspondence between the male and the female, as the plumbers call it, in order that they may lock.

Now, instead of having them at any angle, you have them [121] horizontal, and then you break and skip, your object is to skip one, and, as your Figure 8 of the patent in suit shows, what you do is to skip one and catch the other through your broken ridge there. So that I do not think that the helical

(Testimony of Samuel W. Friedman.)

angle described in the specification is anything but the obvious.

Mr. Mason: Well, your Honor please, I think that is where we have had some misunderstanding, which I am trying to clear up. We have to keep in mind that you have been describing the conventional manner of threading a female and male part, that you are going to screw together. Of course, when the threads meet, you can unscrew it very easily. It does not have a self-locking effect. However, in this patent—and I think this is a substantial departure—we have a combination of two things.

The Court: Let's not argue the case now.

Mr. Mason: Well, I was trying to answer your Honor's point, and it may help if I explain this at this time.

The Court: Yes.

Mr. Mason: Now, the one feature is that one curve of the threads be staggered with relation to another curve, that is, they are diametrically opposite curves. Now, the helical angle we are referring to in the patent is that angle which you define by measuring from one part of one thread of the lower curve to one part of the corresponding [122] thread of another curve.

Now, we make that greater, the helical angle formed by the convolutions of the conduit. But if you had conventional threads, you would not be able to insert the connector into the conduit. So then, what we call the ribs are made relatively short. That enables you to rotate the connector into

(Testimony of Samuel W. Friedman.)

the conduit, and it is then the differential between the helical angle formed by the spacing of the ribs and the helical angle formed by the convolution of the conduit that causes a self-locking effect.

The Court: You are talking about the helical angle as being something different. "Helical" comes from "helix," and a helix is merely a spiral, and the manner of measuring is probably as old as the Phoenicians, who invented geometry.

Mr. Mason: We are not claiming the helical angle, but the difference between the helical angles.

The Court: But look at your Tiefenbacher patent. If your novelty consists in the helical angle, then that portion of your claim reads on Tiefenbacher, because he demonstrates it right there in the picture, a horizontal screw or fitting that catches the spiral in the way yours catches yours.

Mr. Mason: No, your Honor. You will notice in Tiefenbacher that the spiral formed by the sleeve 14 measures and meets with the spiral formed by the convolutions 13.

Now, in that case you can unscrew it, and it does not [123] have any self-locking effect.

However, what these patentees have discovered is that, by making the angle of one greater than the angle of the other, and then making them relatively short instead of continuous, you can obtain—you can not only insert it into the tube or conduit, but when you get it inserted you have a self-locking effect.

The Court: But you also did that by making

(Testimony of Samuel W. Friedman.)

substantially horizontal protrusions, or whatever you call them, and, therefore, your contribution to the art is limited to that particular thing. In view of the art, you cannot claim anything that will insert in the same, locking it, because your claim is not broad enough to cover that. If you read it that way, then it is in the prior art.

Mr. Mason: If your Honor please, as we shall show by Mr. Berry here——

The Court: I am not interested in hearing Mr. Berry, I think Mr. Berry is an advocate, and I think this is a simple thing we can work out. I do not want him brought back again. It is not a misunderstanding. I understand it very well, what you are driving at.

Mr. Mason: The point I want to make is that in none of the prior art is there any showing of the threads of the male member which would correspond to the connector, nor is there any case where there are threads forming a helical angle [124] greater than that of the female member into which it is to be threaded, the female member in this case being the conduit.

The Court: All right. That is argument. Let's get through with the witness.

Mr. Mason: That is all of this witness.

The Court: All right. Step down.

(Witness excused.)

Mr. Welsh: The defendant rests, your Honor.

The Court: Will you give me the file wrapper?

Mr. Mason: I would like to recall Mr. Horton if your Honor please.

The Court: All right.

R. J. HORTON

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Direct Examination

Q. (By Mr. Mason): Mr. Horton, I show you Exhibit 17, which is one of the defendants' connectors which you delivered to me for use as an exhibit in this case, and I will ask you where you obtained that.

A. I got this down at Pryne & Company.

Q. Where is that located?

A. In Pomona. [125]

Q. And when did you obtain that?

A. Approximately ten days ago, or two weeks.

Q. Did you obtain any more at that time?

A. I got, I believe, six.

Q. I have one other of the devices which you have handed me. Is this one you obtained at the same time?

A. No, this is one I got up in San Francisco, I am sure.

Q. When did you obtain that in San Francisco?

A. In October, I believe, of 1951.

The Court: What was the year?

The Witness: October of 1951. I believe it was

(Testimony of R. J. Horton.)

October. It could possibly have been in November, but it was in '51.

Q. (By Mr. Mason): Now, from whom did you obtain it in San Francisco?

A. The California Electric.

Mr. Mason: I would like to offer this in evidence, your Honor.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 29 in evidence.

(The article referred to, marked Plaintiff's Exhibit No. 29, was received in evidence.)

Q. (By Mr. Mason): Now, have you since that time tried to purchase any more devices of the defendant? [126]

A. Yes.

Q. What has been the result of your attempts?

A. I checked at Gough Industries yesterday afternoon.

Q. Where are they located?

A. Down on Second Street, here in Los Angeles.

Q. And what was the result?

A. I found that out of the three fixtures that we opened up——

Q. Were those three electrical fixtures?

A. Electrical fixtures—that they had the same type.

Q. Now, did you purchase one of those fittings?

A. I brought one in, yes. I didn't buy it. He wouldn't sell it. He loaned it to me. But I have two others that I did buy this morning.

(Testimony of R. J. Horton.)

Q. I show you a device which you brought into court and ask you if that is the device to which you refer? A. Yes, that is.

Q. Now, did you obtain a delivery receipt or invoice, or anything, for that?

A. Yes, my wife has it.

Q. Is this the document (handing to witness)?

A. I have two others in the box. They are still sealed up, from Pryne & Company, that I bought this morning.

Q. Now, will you remove this coupling from the junction box, and let us observe the roots on it?

(The witness did as requested.)

Q. Can you with your eyes discern any angle other than a right angle with reference to the major axis of that device?

A. With my eyes, it says it is straight across.

The Court: Let me see that.

(The object was handed to the court.)

The Court: I don't think you are correct. I think if you would measure it you would find that it is at an angle.

The Witness: I put a very fine measurement to it.

The Court: No. It is very obvious. You can see it without glasses. Take off your glasses and look at it. You know, some of us who wear glasses become glass-bound. I think you will see it is at an angle. You can measure it.

Let's get into this helical-angle business.

The Witness: This isn't angled enough to——

(Testimony of R. J. Horton.)

The Court: But you can see the difference. It is not straight across.

Mr. Mason: I hand you a tool with which you can accurately measure angles, and ask you if you can use this.

The Witness: Yes.

Mr. Welsh: What is the angle?

Mr. Mason: It has an angle of less than one degree.

The Court: I see. Well, it has an angle. I don't know the degree of it. [128]

Mr. Mason: I would say one degree, then.

Mr. Welsh: It looks exactly one degree to me. It may be a matter of vision.

Mr. Mason: Now, I offer this invoice in evidence as plaintiff's next exhibit.

The Court: All right. It may be received.

The Clerk: Plaintiff's Exhibit 30 in evidence.

(The document referred to, marked Plaintiff's Exhibit No. 30, was received in evidence.)

Q. (By Mr. Mason): You stated you purchased other devices. When and where did you purchase those?

A. This morning from the Glendale Wholesale Electric house. I have them there in the boxes.

Q. I hand you a box, and ask you whether that is it.

A. Yes, it is. This box has never been opened.

Q. Will you open that up and remove the connector?

(The witness does as requested.)

(Testimony of R. J. Horton.)

The Witness: Do you want to watch me take it out?

Mr. Welsh: Oh, no. I am sure you will do it right. It comes out pretty easily, doesn't it?

The Witness: That could be in the flex not being the proper size.

Mr. Welsh: This is the one you just took out, in my right hand. That is the same thing.

Q. (By Mr. Mason): Just from a visual inspection, it [129] appears that the lugs on one side have a slight angle, and the lugs on the other side seem to be strictly at right angles. Will you use the instrument here and determine whether or not that is the case?

A. I can get the reading on the short side. I am not familiar enough——

The Court: They are both on an angle. This on one side, this nearer to the edge seems to be a little more inclined.

Mr. Welsh: Here is the plaintiff's device, for comparison purposes, your Honor. It is Exhibit 2.

The Court: That is right.

The Witness: Do you want the reading on that?

Q. (By Mr. Mason): Yes. That seems to be about the same angle—one degree off?

A. A little less than one degree off.

The Court: All right.

Q. (By Mr. Mason): And is this the——

A. The purchasing——

Q. ——the purchasing receipt or invoice for this device?
A. Yes.

(Testimony of R. J. Horton.)

Mr. Mason: I offer this in evidence as plaintiff's next exhibit.

The Court: All right. It may be received.

The Clerk: Plaintiff's 31 in evidence. [130]

(The document referred to, marked Plaintiff's Exhibit No. 31, was received in evidence.)

Mr. Mason: Is this the one you just took out of there?

The Witness: No, this is mine.

Mr. Mason: Where is the connector you just took out?

Mr. Welsh: There is one here. This is the one that was taken out of the first box. In other words, this is not the one you took off the box that you just opened.

The Witness: This came out of this (indicating)?

Mr. Welsh: Yes.

Mr. Mason: And this just came out of the last one.

Mr. Welsh: Yes.

The Witness: Yes.

Mr. Mason: I offer this in evidence.

The Court: All right. It may be received.

The Clerk: Plaintiff's Exhibit 32.

(The article referred to, marked Plaintiff's Exhibit No. 32, was received in evidence.)

The Witness: This one can go back?

The Court: Yes, anything you brought, unless we take it and tie a tag to it. The rest is yours.

The Witness: This is one we want to send back.

(Testimony of R. J. Horton.)

The Court: It is yours. Whatever we take, we tag. The rest you take back as your own.

Anything further from this witness, gentlemen?

Mr. Mason: Yes, your Honor.

Q. I show you Defendants' Exhibit B, being a junction box in which what has been introduced in evidence as Exhibit 12, as a Jake connector, has been used.

First, I will ask you to examine that conduit and state whether or not that is the length of conduit such as is in accordance with the Underwriters' recommendation.

A. This is not according to specifications.

Q. How do you determine that?

A. By the no-go gauge and the go gauge.

Mr. Welsh: Just a moment. I move to strike that.

The Court: What is that?

The Witness: This is the outfit we use for testing to determine whether your flex is to Underwriters' specifications.

The Court: I am not talking about Underwriters' specifications. Your Underwriters' specifications have nothing to do with this.

The Witness: Your Honor——

The Court: Please don't interfere.

Mr. Mason: You have the Underwriters' specifications.

The Court: I am not interested in the Underwriters' specifications. I do not think they have anything to do with this lawsuit. We are not talk-

(Testimony of R. J. Horton.)

ing about whether they conform or not with the Underwriters' specifications. We are [132] concerned with whether or not this structure violates one of these, and the fact that evades any of the Underwriters' specifications does not mean anything. They are merely certain rules that have been established, and it is like the Good Housekeeping magazine's endorsement of a food product. It is something in the trade that people comply with, but I cannot see what bearing it has upon the lawsuit.

Mr. Mason: It defines what would be a normal piece of flex.

The Court: I am not interested in that. You have not shown me that the Underwriters have any standing in law.

Mr. Mason: They don't have any.

The Court: If you give me State specifications which are required under the Code, all right, but requirements by Underwriters, who are a private concern and who make certain rules which they hope the trade will adopt, do not mean anything.

It reminds me of an old story they tell about George Adams. You probably remember him. He had a suit before one of the judges, and he asked him what it was. He said, "It is a suit to quiet the Title Insurance and Trust Company." In other words, he was basing the suit on the fact that the Title Insurance and Trust Company would not give him title unless he brought suit. The same way with the Underwriters' specifications. They are private

(Testimony of R. J. Horton.)

rules, and I cannot see [133] that it has anything to do with the matter at issue at all.

Mr. Mason: My only purpose, your Honor, was to show this was not a normal piece of flex, of conduit.

The Court: It does not make any difference whether it is normal or abnormal. The question before the court is one simple thing. You see, you prepared the case with the idea of pursuing unfair competition. In unfair competition that might have some bearing, but you dropped that, and you have made no offer on it, and the case is whether there was an infringement of the single claim that was allowed out of the sixteen that you asked.

I will sustain the objection.

Anything further from this witness?

Mr. Welsh: We have no cross examination.

The Court: All right. Step down.

Mr. Mason: Just one more question, your Honor. I had not quite finished.

The Court: All right.

Q. (By Mr. Mason): I will ask you to examine the junction box and the Jake connector you have just looked at, and ask you to state whether or not that is the manner in which a Jake connector is connected to conduit and a junction box.

A. Definitely not.

Q. What are the differences between the normal manner of doing it and the way in which that is connected? [134]

A. To start with, your Jake connector, if you

(Testimony of R. J. Horton.)

use a piece of flex that has been sprung out of shape, as this has been——

Mr. Welsh: I move to strike that as a conclusion of the witness.

The Court: It may be stricken. He is asking a particular question which requires demonstration as to the manner in which it should be connected.

The Witness: Your Honor, to use this connector, you screw it in with the collar on here (indicating).

The Court: Yes.

The Witness: That is what locks your fitting.

The Court: Yes.

The Witness: This merely pulls it down to lock it on there.

The Court: All right.

The Witness: The way this was demonstrated yesterday, with this inside the box, where the locknut goes, and by using trick methods, which was used——

Mr. Welsh: I move to strike that as a conclusion, your Honor, the “trick methods” part.

Mr. Mason: It may be stricken.

The Witness: O.K.

The Court: All right.

The Witness: To use it like it is made to be used, like [135] you use it every day in the factory—I am an electrician by trade, and I understand this business——

Q. (By Mr. Mason): Do I understand it correctly that you use a collar in addition?

A. You use a locknut.

(Testimony of R. J. Horton.)

Q. You use a locknut in addition to the collar?

A. Instead of putting this on the inside, as it was yesterday, and pulling up this so that it rides over the shoulder of this, you can make this locking effect, but you can't—it is not allowed to be used that way, and it is not intended for that way.

The Court: But your original patent that you describe intended to use that, too. You merely abandoned it because you discovered it can be done without it; isn't that true?

The Witness: Your Honor, when I first made my fitting——

The Court: That isn't the point. You were talking about the same thing.

The Witness: It shows the collar, but the collar doesn't play any part in it, in my plans there.

The Court: You are very selective there. You asked a patent for something. Now you are trying to show it was a device for some other use, when your own patent postulated that kind of use.

Mr. Mason: If your Honor please, in prosecuting this——

The Court: I know I am arguing, but it is because he [136] is arguing with me. If he was just a witness, I would not do this.

The Witness: I am trying to explain to you.

The Court: You are not explaining. You are arguing, and you have a competent lawyer here. You are saying it is a trick to do it that way, but it is the very method you sought to patent.

(Testimony of R. J. Horton.)

Mr. Mason: In the patent we show many things that are unnecessary.

The Court: I know, but it is unfair for the man to use the word "trick." If he has abandoned it since, it shows it does not deserve to be called a trick. Now, let's forget it.

You are like all inventors. You have an idea in your head, and you think you know it all.

The Witness: No, sir.

The Court: All right.

Mr. Mason: That is all.

The Court: All right. Step down.

(Witness excused.) [137]

The Court: I said something so far as not wanting Mrs. Horton on the stand, so far as I am concerned, but I notice she is very anxious to testify, because I heard her whispering when her husband was on the stand.

As I told you, I have a very keen sense of hearing, and if my eyesight were as keen as my hearing, I would be in fine shape. I heard her at times muttering things to herself when her husband was testifying.

So if you want to put her back on, or put Mr. Berry back on, it is all right with me. I am merely following the custom which I follow in all cases, not to have repetition, especially as between husband and wife, because usually when one has testified to the facts, the other will merely concur. But if she has anything new, you can call her. I didn't want her to get the impression that I was trying

to tell you or anyone what witnesses to put on or not to put on. All I am doing is to try to save judicial time. [137-A]

Mr. Mason: Yes. All I am saying is she is more familiar with dates than her husband.

The Court: On dates we are all agreed. We have all the dates. And as to any matters of accountancy, and things like that, that is a problem we haven't reached yet. When we reach the problem, where an accounting is ordered, then perhaps her testimony will be needed, because she probably knows those details better than he does. But, as you know, I don't hear any accounting. If I find infringement, then I will send it to a master for an accounting, as is usually the rule. But we will not get to that for a couple of years, because an appeal will probably be filed from the interlocutory decree, and we will merely go through the motion of appointing the master, and then stop him in his tracks until the interlocutory decree is passed on by the higher court.

However, I did not want to keep from the record any additional testimony that she may wish to offer. The same way with Mr. Berry, if you want to add something to what he has stated yesterday.

Mr. Mason: I do.

The Court: All right.

Mr. Mason: And I would like to renew my offer, unless the defendant has dismissed the counterclaim of mismarking. I would like to clear that up as a matter of record.

Mr. Welsh: No, we dismissed that yesterday.

The Court: He said he is making no offer under it.

Mr. Mason: I didn't know you had dismissed it.

The Court: Furthermore, he dismissed it after I made the statement that I didn't think this involves any mismarking, because it is a natural thing for a person to take the number. As a matter of fact, he did more than is necessary. So, in view of that, counsel dismissed it.

So you have dismissed your unfair competition, and he has dismissed his counterclaim, and we have just one question. There has been nothing to attack the validity of the patent, unless there is some argument made on the basis of prior art, so the only problem before us is whether there was infringement.

Now, this is off the record.

(Discussion off the record.)

Mr. Mason: I would like to recall Mr. Berry just briefly, your Honor.

The Court: All right.

R. S. BERRY

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Direct Examination

Q. (By Mr. Mason): Mr. Berry, will you refer to the Wilson patent shown in the prior-art patents? [139]

Mr. Welsh: Which one?

Mr. Mason: The Wilson patent.

(Testimony of R. S. Berry.)

Q. (Continued): And state how that operates?

The Court: Have you got it in front of you?

The Witness: I have.

The Court: Go ahead.

The Witness: I didn't get the end of that question.

Mr. Mason: State how it operates.

The Court: He asked you to answer how it operates.

The Witness: I didn't quite catch it.

The Court: All right.

The Witness: This is a coupling that involves groups of interrupted threads of a male and a female member. The purpose is to insert the male member into the female member until all of the threads of the respective members are aligned, and then by rotating the members relative to each other a partial revolution, all of the threads of each group are collectively intermeshed or interengaged.

Q. (By Mr. Mason): Do the threads of the female member and the male member mate?

A. They are mates. They must necessarily be on corresponding pitches in order to interengage.

Q. There is no difference, then, between the helical angle formed by the threads of the male member and the helical angle formed by the threads of the female member? [140] A. No.

Q. Now, will you refer to the Jacobi patent and state how it operates?

A. We have here in the Jacobi patent a similar arrangement, except that they provide a lead thread.

(Testimony of R. S. Berry.)

In this case the two members are brought together until the lead thread is brought into position to engage the end thread, so that, by starting the rotation of the two members relative to each other it ensures alignment of one group of threads with the other group of threads.

Q. Did the threads of either of the patents you have described effect a self-locking connection?

A. I didn't catch that.

Q. Did the threads of either of the devices you have described effect a self-locking connection?

Mr. Welsh: That is objected to as calling for a conclusion.

The Court: He is an expert. That is all right.

The Witness: By "self-locking" I take it is meant a gripping action. Obviously, the threads being of corresponding pitch in both cases, if the threads are of close fit, there will be a resistance in tightening the threads as well as in loosening them, as in any screw-thread arrangement, but no such interlocking would occur as compared with the devices in evidence. [141]

Q. (By Mr. Mason): Now, will you refer to the Hunter patent and state how that operates?

A. Did you say "Hunter"?

Q. Hunter.

A. The Hunter patent is based on a conduit coupling of the character of the devices of the plaintiff and defendant in this case. The coupling is formed with screw threads that are continuous

(Testimony of R. S. Berry.)

and having a pitch corresponding to that of the conduit with which they are to be engaged.

The device is designed to effect a clamping action by reason of advancing the conduit on the threads of the coupling until the end convolution of the conduit is brought against an abutment. After having initially made this abutting contact, further screwing of the coupling and conduit relative to each other to advance the conduit on the coupling forces the end convolution to expand, and in expanding it is obviously enlarged and is brought into contact with the surrounding wall.

The action here is to foreshorten the conduit to a slight degree and at the same time expand the end convolution. The gripping action is effected by the expansion of the end convolution against the surrounding wall.

Q. Now, is that the end convolution only, or any other convolutions?

A. I didn't quite catch that.

Q. Does it expand merely the end convolution?

A. Yes, it expands merely the end convolution.

Q. Now, I will ask you to refer to the Horton patent in suit, in which you will observe a collar, denoted by the numeral 8, and ask you to state whether or not that collar functions to perform the purpose of the collar in the Hunter patent.

A. No.

Q. Have you studied the other prior-art patents introduced by the defendants in this case?

A. Yes.

Testimony of R. S. Berry.)

Q. Have you found any of those in which the spiral angle, the helical angle, formed by the ribs or threads of the male member, differs from the helical angle formed by the threads in the female member? A. No.

Mr. Mason: That is all.

Mr. Welsh: We have no cross examination.

The Court: Mr. Berry, I want to ask you one question.

The Witness: With pleasure.

The Court: It is not relating to this, and I did not ask it yesterday because I had not read the file wrapper, which I have now read. Yesterday, while you were being examined, when your attention was called to Figure 2 and Figure 8, which show horizontal, you said that was only one of the embodiments of the invention, and you drew in a little [143] modified ridge in red——

The Witness: Right.

The Court: ——to show that there is no deviation, and that, while you said “horizontal,” it meant substantially horizontal; that it did not mean horizontal, it allowed for modification, as I told you it meant in my language. You remember that?

The Witness: Yes.

The Court: Now, I want to call your attention to the fact that you said you did not write the specifications.

The Witness: The original specifications, no.

The Court: However, you signed all the letters which appear.

(Testimony of R. S. Berry.)

The Witness: That is right.

The Court: Whether you dictated them, or as to the man who wrote them, I am not going to ask.

The Witness: That is correct.

The Court: I want to ask you why, then, after all of them had been rejected, and they had intimated that, while you had sixteen claims, possibly two might be allowable if it were properly reworded, why, then, in accepting that ruling as to all except No. 10, which you insisted should be allowed, and that finally was disallowed, why you said in this letter, this:

“Applicant elects to prosecute claims drawn to [144] the invention as shown in Fig. 2, in the event no generic claims are allowed.”

Why, if Figure 2 was merely one illustration, why did you choose that as a correct representation of your invention without any modification?

The Witness: That is very easily explained, your Honor. That has to do with a question that is known as election of specie. You will notice that the construction in Figure 2, which constitutes the subject matter of the allowed claim, is based upon the coupling where it is applied to a box.

The Court: Yes.

The Witness: The construction shown in Figure 8 is another application of the same idea to a coupling which is used in joining the two conduits together.

Now, as the application was filed, claims were

(Testimony of R. S. Berry.)

drawn specifically as to each application of the idea.

The Court: Yes.

The Witness: Now, the patent was denied, or the groups of claims on the specie, because one of them recited the terminal box, while the other recited the coupling.

Then it was necessary for the applicant to elect which of those groups he wished to prosecute in the application. Ordinarily, it is a matter of division.

The Court: So you chose 2?

The Witness: So we chose 2. [145]

The Court: Fine. That is an answer.

The Witness: It is an answer.

The Court: It is an answer. Now, then, if you say now that deviation up to five per cent is within the teaching of the patent, why did you say in the same letter:

“The other references show interrupted screw threads and do not teach applicant’s arrangement of ribs which are extended at right angles to the axis of the coupling”?

The Witness: All right. They don’t.

The Court: All right. Then why didn’t you say, “at substantially right angles”? Why did you make a claim there? In other words, in this waiver you claimed the right angles as a feature which the others do not refer to. Now you say you did not mean that, that you meant “at substantially right angles,” and a deviation is an infringement of the patent.

(Testimony of R. S. Berry.)

The Witness: I would explain that in this way
Not having made that statement myself——

The Court: In other words, you just signed the
letter?

The Witness: That is all.

The Court: Then I am sorry. Then I will not
ask you any questions at all, sir.

Mr. Mason: I would mention this, your
Honor——

The Court: That is not fair. I know what I
have in [146] mind. If you just signed what the
other man said, that is one thing.

The Witness: Obviously, your Honor, I can't
testify as to the reasoning of the workman here
as to why he does a certain thing.

The Court: That isn't the point. But you signed
the letter, and it was supposedly dictated by you.

The Witness: I think his statement was per-
fectly correct.

The Court: No, I think I am wrong. It does
say "CJC" dictated it.

The Witness: That is right.

The Court: I am sorry. Then I will go by what
it says rather than an explanation, because it isn't
fair to you to ask you what was in your mind, when
nothing was in your mind except that you signed
what the other man wrote.

The Witness: I approved.

Mr. Mason: Since the man is not here, I would
like to call attention to the fact——

The Court: Let's not argue.

(Testimony of R. S. Berry.)

Mr. Mason: This isn't argument, but in the other claim it specified where it was substantially at right angles.

The Court: Where?

Mr. Mason: It is the amendment of July 3, 1947. That is it. And in the amendment to Claim 2, which became the [147] claim of the patent, it was stated.'

The Court: I know it is "substantially," but "substantially at right angles" means at right angles with possibly some error in deviation, such as is allowed, but not a deviation, not a departure as high as five per cent. That would not be substantially at right angles.

Mr. Mason: I will present my argument on that, your Honor.

The Court: All right.

Now, there was another matter that they suggested in regard to the helical angle, but so long as you did not write the answer, there is no use in asking you the question.

Let me see if you signed that letter. No, that is dictated by "CJC", too.

Then we will let it go, and it becomes a matter of discussion rather than evidence.

Mr. Mason: That is all. The plaintiff rests.

The Court: Any redirect?

Mr. Welsh: No, nothing further.

(Witness excused.)

The Court: Gentlemen, we have ample time. I do not want to shorten your time, and I think the best way is for you to come back this afternoon,

and then you will have ample time to fully argue the matter.

I had an opportunity to study the record, and the only [148] one I didn't study yesterday was the file wrapper. I am now familiar with it, as I have indicated by the questions, and I have marked some other questions which may be discussed when we argue the matter.

So we will take a recess until 2:00 o'clock.

Before we do that, Mr. Clerk, is your record complete now so far as all the exhibits are concerned?

The Clerk: Yes, your Honor.

The Court: All right.

(Whereupon, at 11:30 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same day.) [149]

Los Angeles, Wednesday, Jan. 6, 1954, 2:00 p.m.

The Court: All right. gentlemen.

At times, after a case is concluded and before arguments begin, counsel think of odds and ends that they may wish to present, and as we have gone along very rapidly, if either side has anything further you desire to present for the record, you may do so before we begin the argument.

Mr. Mason: There is one brief matter, your Honor, on which I would like to reopen, unless I can get a stipulation, in view of Mr. Friedman's testimony just prior to the close, that he had not made any changes in his structure.

Now, during the noon recess I found a one-inch

and a half-inch device, of what he says was one of the earlier models, and the present ones which are in evidence obviously are changes. I think it pinpoints my argument here, because it shows that he originally made the ribs at a greater variation from the perpendicular.

Mr. Welsh: I don't think this is the time to argue this. If counsel wants to put it in evidence, all right.

Mr. Mason: If you have no objection, I would like to call Mr. Friedman.

Mr. Welsh: You can call Mr. Friedman.

Mr. Mason: May I reopen for that purpose, your Honor?

The Court: Yes. [150]

SAMUEL W. FRIEDMAN

recalled as an adverse witness by the plaintiff, having been previously duly sworn, testified further as follows:

Direct Examination

Q. (By Mr. Mason): Mr. Friedman, I show you two devices—one, which is the one-inch-size connector, bearing the notation "MS". Is that one of your manufacture?

A. That is correct.

Q. And I show you another which bears the notation "MS", which is apparently a one-half-inch connector.

A. That is correct.

Q. And those were made by your company?

A. Yes.

Q. I show you Exhibit 18 in evidence, which is

(Testimony of Samuel W. Friedman.)

the half-inch connector which you are now manufacturing; is that not true? A. Yes.

Q. And Exhibit 20 is the one-inch connector which you are now manufacturing; is that correct?

A. Yes.

Q. Now, you observe that some change has been made as between the two devices which I have just shown you and Exhibits 18 and 20, do you not?

A. No, there is no change basically to the connector. [151] That is what I meant. Basically we have not changed the connector.

Q. Let me ask you this: On the half-inch connector which I have in my hand, as compared to Exhibit 18, you find, do you not, that on the ribs which has not been identified in evidence as yet, it is thinner and has a lesser angle to the major axis than the device in Exhibit 18?

A. As far as I can see, they are both the same. Basically, they are both the same connector, and the angle is approximately the same.

Q. You observe also, do you not, that the unidentified connector which I have shown you, in comparison with Exhibit 20, shows thinner ribs and ribs disposed at a different angle?

A. No, I say they are approximately the same.

Mr. Welsh: You mean the angle or the thinness now?

Mr. Mason: I am speaking of the angle.

Q. You recognize they are thinner on the unidentified model than on Exhibit 20, are they not?

A. Yes.

Testimony of Samuel W. Friedman.)

Q. So that change has been made?

A. Yes, if you want to call it that.

Q. Do you know when it was made?

A. No, I would have to check back on that.

Q. Do you know when the change was made in Exhibit 18, as compared with the one-half-inch?

A. No, I do not.

Mr. Mason: May I have these marked for identification? First, the one-half-inch.

The Court: All right.

The Clerk: That is Plaintiff's Exhibit 33 for identification.

(The article referred to was marked Plaintiff's Exhibit No. 33 for identification.)

The Court: All right. Anything else?

The Clerk: Mr. Mason, are there two to be marked?

Mr. Mason: Two, yes.

The Clerk: Then this is Plaintiff's Exhibit 34, also marked for identification.

(The article referred to was marked Plaintiff's Exhibit No. 34 for identification.)

Mr. Mason: I will have to call Mr. Horton to measure, that is, to show the difference in angle, Your Honor.

That is all.

The Court: All right. Now, I want to ask Mr. Friedman one question:

You were shown an exhibit, I forget the number, in which there was no angle, but where the ridges were parallel but broken.

(Testimony of Samuel W. Friedman.)

The Witness: That was the three-eighths-inch.

The Court: And you made the statement that you never [153] sold those, that you made some samples and then distributed them to the trade, and then you say you abandoned them. I wanted you to amplify that.

The Witness: We gave those out to the trade and then, through their assistance, we made the necessary changes to improve it.

The Court: And those were just experimental?

The Witness: That is correct, sir.

The Court: At the time you did that, you knew of the plaintiff's patent, did you not?

The Witness: Yes.

Q. (By Mr. Mason): Mr. Friedman, is it not true that you actually sold some of the three-eighths-inch connectors in which the ribs were at 90 degrees?

A. No, I did not sell any of those. We did not.

Q. You know, do you not, that some of the dealers to whom you gave them as samples, as you say, did sell them?

A. We only gave them one each, so that I don't think they would have sold them.

The Court: You never gave——

The Witness: Any quantity.

The Court: ——any quantity?

The Witness: No, sir.

The Court: Have you any of those in your stock anywhere?

Testimony of Samuel W. Friedman.)

The Witness: No, sir. [154]

The Court: How many did you make?

The Witness: A hundred, or a few hundred; something like that.

The Court: And that was in what year? 1951?

The Witness: I think it was around 1951, sir. I am not sure about the date.

Q. (By Mr. Mason): Who made the changes in the angle of the ribs?

A. When you say "who," what do you mean by who'?

Q. Was it a diemaker you employed?

A. Yes, it was a diemaker.

Q. What was the name of the diemaker?

A. It was Crown City Diecasting Company.

Q. You don't know when they were made?

A. No, offhand I can't give you the exact date.

Q. And you don't know how many you disposed of prior to the change?

A. I told you approximately the 100 or 200 that were made.

Q. How do you arrive at that figure?

A. Because we called it a sample run.

Mr. Mason: That is all.

The Court: All right.

(Witness excused.)

Mr. Mason: Mr. Horton, will you come forward?

R. J. HORTON

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Direct Examination

Q. (By Mr. Mason): Mr. Horton, I show you Exhibit 33 and ask you if you have had occasion to measure the angle of the ribs on that device?

A. Yes.

Q. And to what extent, if any, do the ribs vary from the perpendicular? When I say "perpendicular," I mean perpendicular to the major axis.

A. This has a 5-degree angle.

The Court: Which connector?

The Witness: This, the ribs.

The Court: But what exhibit?

Mr. Mason: That is Exhibit 33, your Honor.

The Court: All right.

Q. (By Mr. Mason): Now, I ask you to look at Exhibit 34, and ask you if you have made the same measurements of the ribs on that device.

A. Yes.

Q. And what did you find?

A. Six degrees.

Q. That is, it varies six degrees from the perpendicular? [156] A. Yes, sir.

The Court: Is that caused by the fact that one of them is wider than the other?

The Witness: Well, it is caused by two things, your Honor. One is that he heaved up his lug in order to make it act as a straight-across.

The Court: You mean——

(Testimony of R. J. Horton.)

The Witness: The lug (indicating).

Mr. Mason: That is all I have.

The Court: Any questions?

Mr. Welsh: No, I have no questions.

The Court: All right.

Do you want to offer those exhibits now?

Mr. Mason: Yes, your Honor, I offer those in evidence.

The Court: They may be received.

The Clerk: 33 and 34 in evidence.

(The articles referred to, marked Plaintiff's Exhibits Nos. 33 and 34, respectively, were received in evidence.)

The Court: Now, gentlemen, is there anything further you want to offer before we hear the argument?

Mr. Welsh: Nothing further, your Honor.

The Court: All right. [157]

* * * * *

[Endorsed]: Filed May 28, 1954.

[Title of District Court and Cause.]

ORAL OPINION

Los Angeles, Wednesday, Jan. 6, 1954, 2:00 p.m.

The Court: Gentlemen, this case has been reduced to a simple issue. I have had ample opportunity to study the prior art, which is limited, and

the file wrapper, and I have heard the oral testimony given and have seen the demonstrations.

The patent is a simple one, involving the one claim only, and I can see no reason why it cannot be decided at the present time.

I do not think there is any disagreement between us as to the principle which applies, and that is that the patent is infringed if, despite colorable deviations, the accused device shows identity of means, identity of operation, identity of result.

As you know, I am rather old-fashioned when it comes to the law of patents, and I think probably you will find that I have sustained patents and have found infringement probably more often than any judge on the Pacific Coast. In other words, I have not adopted that statement which may have attributed to the Supreme Court, but which in reality is contained only in a concurring opinion by Mr. Justice Douglas, about patentability not applying to mere gadgets.

In my career on this bench I have stated—I think it [2] was either in the Kersting case or the Mantz case—that even though an invention be humble, it is entitled to protection. And you will remember that I protected the Sundback patent, which was for the zipper, against infringement by a Japanese imitation. In order to do that, I had to take as standard a sloppy construction which worked, as against standard construction which did not work, because the history of the art showed that the zipper was made workable so that it could apply not only to rigid straight surfaces, but become flex-

ble; that instead of fitting the members in in a workmanlike manner one over the other, they were fitted in in a sloppy manner, and the man by doing a sloppy job had struck upon something that made the zipper more workable than it had been before. I am still of the opinion that it is the object of the Constitution and of Congress, in enacting the patent law, to protect an interest in all inventions, and in all my writings I have insisted that the person should be protected against the man who deliberately or fortuitously appropriates it.

In that respect we are in a different position than in the domain of copyright, where you have to show actual copying, and where we concede the possibility of spontaneous creation on the part of two persons working separately, the one not knowing about the other.

In the law of patents it does not make any difference. [3] It is priority that determines invention, and if you strike upon it without knowing what the other man did, you are still guilty of infringement, even though it were fortuitous.

However, there is also this fundamental principle to be observed, and I have written a good deal on the subject. In fact, in one case I went back, as I often do, to the history of the doctrine that where a patent is in a crowded field or is a paper patent that has not been put into actual practice, the inventor is entitled to only a narrow range of equivalent, and if there is a deviation either in the means, such as dropping one element, or in the operation, or in the result, that there is no infringement.

One advantage of having long experience in a particular field is that you meet yourself again, and when this case began I remembered another case of mine, also involving a coupling, in which I had given to a narrow invention a broad range of equivalent, only to be reversed by the Court of Appeals. That case is *Schnitzer vs. California Corrugated Culvert Co.*, 140 F.2d, 275. That case involved a pipe joint, a flexible pipe joint. I think many of you are familiar with irrigation, and that in the northern part of the state and in Oregon many a time, in order to irrigate, instead of using ditches, as we do down here, they use pipes. One of the problems they have found in using pipes is that pipe may break because of the rigidity of the joint. So a man invented [4] a flexible joint, and the California Corrugated Culvert Company imitated it in a manner which I thought constituted infringement. The action was brought by the Alien Property Custodian, because the owner of the patent was a German subject. It was brought in the name of Crowley, the then Alien Property Custodian. I tried the case in Oregon in 1942. I found there was infringement, but the case was reversed, and the opinion was written by Judge Healy, who is still on the Court, and I think the language used in that case is very appropriate here because there, again, as here, an attempt was made to give to certain language in the claims a broader meaning than it actually had. The Court of Appeals went back to the file wrapper and held that the file wrapper contained a statement wherein the inventor limited

himself to a certain means, and that, having limited himself to that, I was wrong in holding that the means used by the infringer was a substantial infringement of the device. The opinion is very brief, and I want to read it to you:

"The invention relates to conduits for conducting water for irrigation and other purposes, and specifically to the joints between the conduit pipes. The purpose of the invention, it is said, was to provide a joint sufficiently flexible to permit of the pipes' being laid over irregular ground, and readily disconnectible so as to permit [5] of the easy removal of a line of pipes from one area to another. As described in the specifications, the coupling sleeve has an internally threaded cylindrical neck screwed on the threaded end of a pipe. The other neck of the sleeve is also cylindrical but smooth so that the end of the companion pipe can be inserted through the neck 'and through the hat-shaped rubber packing,' the 'flange' of which 'is held in a recess' of the sleeve. The cup of the rubber packing fits tightly over the end of the inserted pipe, and this pipe is held fast to the sleeve by means of a hinge."

There was only one claim in suit, and that was claim No. 3. I am not going to take the trouble to read it, but then this is what the court said:

"This is a combination patent, all the elements of which are concededly old. The rubber packing, preventing leakage and permitting flexibility of the joint, is the crux or key element of the combination, Appellants argue that Lanninger's invention is

a mere aggregation of parts, and that it was anticipated. We find it unnecessary to consider the validity of the patent since we think it was not shown to be [6] infringed.

“Appellees manufactured a few sleeves, or couplings, which conform closely to claim 3 as illustrated in the drawings and specifications of the patent. One or more of these models were introduced in evidence. The ‘hat’ packing used in this model has a flange perpendicular to the axis of the sleeve, and this flange is retained in the annular groove into which it fits tightly. The parties disagree as to whether the flange is ‘clamped’ or ‘retained’ or ‘held’ in the groove, but it is clear that the packing stays in place by reason of its very shape and the shape of the recess into which it fits. This coupling was expensive to make and it was not manufactured commercially. The couplings appellees have made commercially and have successfully marketed have a rounded and relatively shallow groove, and they do not employ the hat packing. They employ instead a ‘U’ or ‘V’ shaped packing, which is the same type of packing as that used by appellants in their alleged infringing device. Appellants therefore deny that their device is an infringement upon the combination specifically claimed in the Lanninger patent.” [7]

Now, I am skipping a portion of the description and getting down to the portion of the opinion which holds that even that slight deviation was sufficient to save it from infringement. (Continuing):

“We turn once more to Lanninger’s description of his invention. Figure 1 of the drawings clearly indicates a flange packing. As already noted, the specifications describe the packing as hat-shaped, and as having a ‘flange’ which ‘is held in a recess’ of the sleeve. The specifications further state that the very strong vertical flange on the packing cup permits of a specially simple fixation as it is inserted and clamped in a groove of the coupling sleeve.’ The claim is more general, but it describes the packing as ‘having a flange frictionally retained in the groove.’ It is clear, we think, that the flange described is a vertical flange, that is, perpendicular to the axis of the sleeve, and that the phrase ‘frictionally retained’ was used advisedly without substantial reference to retention or sealing by hydraulic pressure.

“The claim is to be read in connection with the specifications.”

I am skipping a lot of references beginning with *Carnegie [8] Steel Co. vs. Cambria Iron Co.* down to *Corcoran vs. Riness*.

“Where the claim uses broader language than the specifications, reference may be had to the latter for the purpose of limiting the claim. * * * The file wrapper contains evidence that the inventor understood this element of his claim in the narrower sense. During the proceedings before the Patent Office, two of the claims were rejected on *Anderson*, No. 811,812, and the inventor undertook to differentiate *Anderson*’s invention, saying: ‘*Anderson* * * * does not show a packing having a flange

clamped in the sleeve.' (Anderson employed a U packing fitting into a seat similar to the one found in appellants' device.) While it is the rule in this Circuit that admissions made by the applicant to the examiner are not to be used to narrow the scope of his claim unless he has made changes in his application pursuant to the examiner's suggestions, yet the proceedings may be used to aid in construing the claim, * * *

"We conclude that the allegedly infringing device employs as one of its elements a packing different from that described by Lanninger, and that the two packings do not function in the same way. Appellees attempt to minimize the differences, [9] but we think they are sufficiently substantial to spell non-infringement. Lanninger's combination is not entitled to any broad range of equivalents.

"Reversed."

Now, I think there is great similarity between what took place in that case and what took place here. We start out with an application for a patent in which nineteen claims were made, and the claims cover seven pages of typewritten manuscript. All of them were rejected and reliance was placed upon the patent's mention finally given in the references. After a long correspondence and amendment of the claims, the patent attorney finally canceled all of the claims except claims 2, 10, 11, 14, and 16. This was on July 3, 1947, over a year after the application was made. The application is dated May 10, 1946.

It is very interesting to note that in the argument which he presented as a ground for allowing the

other claims, he pointed to the fact that one of the important things in the invention is that the ribs were not convolutions because they were at right angles, and convolutions are not at right angles. This is what he said on page 2 of his letter, and this is by Mr. Berry, who was the attorney in this case. First, he signed the letter, although he did not prepare it, but, nevertheless, he was the witness who tried to defend his [10] present interpretation of the claim. This is what he says:

"The other references show interrupted screw threads and do not teach applicant's arrangement of ribs which are extended at right angles to the axis of the coupling. In other words, applicant's ribs cannot be likened to screw threads as they perform an entirely different function entirely beyond the concept of any of the references.

"Reconsideration of claims 10, 11, 14, and 16 is respectfully requested inasmuch as each of these claims define the novel ribs extending at right angles to the axis of the sleeve a distance less than one-half of the circumference of the sleeve. This feature is not shown nor suggested by any of the references. As pointed out the secondary references merely show interrupted screw threads and applicant's ribs cannot be likened to such screw threads.

"Applicant elects to prosecute claims drawn to the invention as shown in Fig. 2, in the event no generic claims are allowed."

And, of course, all of his generic claims have been rejected. Then the examiner came back and

again rejected them, and also stated that the interrupted thread would not show invention. [11]

Six more months passed, and then under date of November 10, 1948, claims 2 and 10 were retained in the case, the only change made in the original claim 2 being the words "ribs extending substantially at right angles to the major axis of said tubular member."

Now, remember, the letter in which the right angle feature was insisted upon is the same letter in which this change was made, adding these words, so that it cannot be argued that the substantiality had a different meaning, because while he makes this suggestion, he keeps insisting that it was the right angular position which distinguished the patented invention from the prior art.

Once more all the claims were rejected. In fact, they are noted as canceled, and they say that No. 2 appears allowable, and then argue about 10, and the attitude remained unchanged.

Now, in answer to this another letter was written six months later, on November 10th, also signed by Mr. Berry, in which he insists that claim 10 should be allowed, because claim 10 defines a spiral having a greater helical angle than the normal helical angle of the convolutions of the conduit, and for that reason is distinguishable.

Evidently, the examiner was getting tired of the correspondence, and he finally wrote a letter in which he said that this is the end, either you take 2, or no more [12] amendments will be accepted,

and as of May 10, 1946 he rejects 10, marks 2 as ready to be allowed, and states this:

“* * * The modified device of Hunter is considered the full equivalent of that device claimed by applicant in that any difference that may exist between the differential helical angle is deemed no more than a mere matter of choice, design, or expediency. Furthermore, the stretching action set forth by applicant is held to find its full equivalent in the stretching action of Hunter.

“As a clear issue has been reached, this action is made FINAL.”

The “final” is spelled out in capital letters, which means no further amendments will be considered.

Then we find a letter from Mr. Berry, and it shows that claims 7 and 10 have been canceled, and the patent is allowed to issue on the allowed claim which had been requested.

Now, this correspondence shows that the plaintiff here started out with an invention for which he claimed great originality, and ended up with a single claim out of nineteen, and with a statement on his part that if no generic claims are allowed—which were not allowed—that he wanted to prosecute the claim drawn to the invention as shown in Fig. 2.

Now, the invention, as shown in Fig. 2, as I pointed out [13] to you before and pointed out to Mr. Berry, shows clearly that these ribs are at right angles, and in order to show that they were at right angles the figure and the drawings which are attached to the application, and as they were recopied

into the patent, show a dotted line being drawn crosswise from the bottom of one of the ribs to the other, to show the perpendicular character of the rib, and Figure 8 shows the way it works in engaging the conduit, because it is so arranged.

Repeatedly in these cases we have situations where the inventor, although having abandoned a claim, or having been refused claims in the Patent Office and having been limited to a very narrow claim, tries to recapture them.

I have had these cases before me repeatedly, and one of the most interesting cases I have had is that of *Joyce, Inc. vs. Solnit*. *Joyce, Inc.* is the shoe company. That case involved the *Joyce shoes* which I myself wear in the summertime. But platform shoes have been known for centuries. They appeared not only in the prior art, but appeared as having been used in costumes, and are notoriously present in the manner in costumes of the Chinese.

Solnit and others began the manufacturing of platform shoes, but instead of containing one enclosed sole, they contained an ordinary sole, and merely raised them at the heel by having round members. It was argued that it was an infringement of the patent. I held that it was not. By the [14] way, you appeared for the defendants in that case, Mr. Mason, or, rather, Mr. Graham did. This is what I said:

"If we interpret the midsole member to include any wedge-type heel raising device, in a shoe construction, the invention would be invalid for anticipation. Novelty alone is not invention. * * * The art

s very old. There are in evidence wedge-type shoes long ante-dating the plaintiff's invention. Wedge-type shoe construction dating centuries back appears in art works and works on costume design. The fact that some of them relate to 'slippers' does not call for a different conclusion. Plaintiff's original application called for a 'slipper.' There would be no invention in applying to shoes for street wear the art heretofore applied to house slippers. They are branches of the same art,—the art of shoe-making."

So I found the claims limited to the structure actually described in the claims and illustrated by the specifications, valid, but not infringed.

Now, in that case there were palpable imitations of the shoe and the appearance, but there was no attempt at that time to bring in unfair competition. Later on I think there was a follow-up of this case, and I eliminated some shoes because they had imitated the color and the other devices used by [15] Joyce.

Now, in the Mantz case, that is, Mantz vs. Kersting, 29 Fed. Supp. 706, that again involved a simple patent. That is the case in which I used the expression that an invention may be humble and yet be entitled to protection. This is on page 712:

"Counsel for plaintiffs concedes that it is a 'humble' invention. Humility or simplicity does not, necessarily, mean lack of invention."

I think that the record in this case shows the manufacture by the defendant of a limited number of samples which could be said to conform to the

teachings of the plaintiff's patent. However, the uncontradicted evidence in the record is that they were not for sale. They were not sold. They were merely samples distributed to a few customers, and were abandoned thereafter, and none of them have ever been made since that time.

So, this being an equity case, we have to take the case as it exists at the time, and even if it were conceded that manufacturing them, threatening for sale, and offering for sale, might entitle the inventor to an injunction to prevent the possible carrying of the scheme into effect, nevertheless, I am satisfied from the state of the record that there is no evidence that any of them are in the field of trade; that they were made as samples and were given out as samples in lots [16] of one to a customer, and that those that are in actual use are the devices which have been introduced here, and which show that the means used by the device of the defendant are entirely different.

To go back for a moment, by way of summing up, to the single claim, it says:

“In a coupling for spirally-wound, flexible conduits, a tubular member having means at one end adapted to be affixed to the wall of a junction box or the like, the other end of said coupling being insertable within the end of a conduit, and having a series of ribs extending substantially at right angles to the major axis of said tubular member and adapted to engage the convolutions of the conduit, said ribs being sequentially disposed in staggered relation along the outer surface of the con-

duit-engaging portion of said coupling so as to define a spiral having a greater helical angle than the normal helical angle of the convolutions of the conduit."

Now, since this claim was allowed, the portion of it relating to the coupling, while not abandoned, is not being manufactured, the object being to secure the full advantage for the coupling, regardless of its adaptation to a box. I should have said that the adaptation to a junction box has been [17] practically discarded, and the emphasis is placed upon a coupling to be used wherever a coupling is necessary, and the two elements are the ribs extending at right angles to the major axis, and the ribs being so disposed in staggered relation that they define a spiral having a greater helical angle than the normal helical angle, which means, of course, they are spaced farther apart than are ordinary spaced convolutions of a conduit.

Now, it is quite evident to me that right angle means right angle, and that the inventor so exemplified his invention, and when pinned down by the Patent Office to designate the embodiment of the invention, he says that he chooses as the embodiment Figure 2, which clearly shows a right angle. I think the word "substantially" at right angles modifies the words "right angles" very much, and is intended to take care of such tolerances as may be allowed in the construction of devices which are not in the realm of precision devices and the construction of precision instruments. I think a coupling which contains these broken convolutions

at a five or six-degree angle is an entirely different means. I am also of the view, by examining the tubing after it had been applied, that it does show a pressure at different places when the accused device is applied than when the patented device is applied. The accused device exercises an outward pressure, while the patented device achieves a locking by a [18] stretching and a spreading of the convolution.

I think the result is difficult to determine, because ultimately all that is achieved is to lock it in place, and the demonstrations made by the plaintiff himself, one of the inventors, show that even the prior art resulted in a locking, because when he used it on the same types of tubing, which he brought for use with his own device, a locking process resulted. Whether it is tighter or looser cannot be determined, because I think the mere fact that when it was applied it could not be applied by hand, but had to be removed by the use of pliers, in itself does not demonstrate any appreciable difference in the results. So we find that clearly one of the means used by the accused device differs from the others, and because it is an angle it operates in a different manner. Whether it locks more tightly and can be removed more easily, I think is immaterial, because the law of equivalents does not require that there be deviation in all respects. If one of the elements is a substantial deviation, denoting invention, there is no infringement.

We have a case where the plaintiff himself in the course of the proceedings in the Patent Office

has accepted a single claim, which he said is exemplified by a figure which clearly shows ridges or ribs at right angles, and the accused devices now in commerce and manufactured by the defendants are at an angle and operate in a different manner, because the pressure [19] is applied differently, and under the teachings of the Schnitzer case, where you are dealing with a combination old in the art, that in itself is sufficient. The court in that case said that the infringing device, nevertheless, "employs as one of its elements a packing different from that described by Lanninger, and that the two packings do not function in the same way."

The result, of course, is the same, because there we had a flexible joint. It is quite evident to me that I was so much impressed by the fact that they functioned in the same manner and that the result achieved was the same that I felt that there was infringement.

I did not write an opinion at the time. However, even if I were to feel, as I sometimes do, that I am still right despite what the Court of Appeals did to the case, nevertheless, I would have to follow the teachings which they lay down, and that is that when we are dealing with the claims in a crowded field that have been delimited by the Patent Office, with the acquiescence of the plaintiff, to a particular structure, you cannot find infringement by applying it to other structures, in which at least one of the elements is different and which does not function in the same manner.

Gentlemen, I have indicated the grounds for my

opinion, and judgment, therefore, will be for the defendant. I will not allow costs to the defendant, and I will not allow attorneys' [20] fees.

Mr. Welsh: May we have twenty days to submit findings?

The Court: Yes. You may prepare findings, and you may submit them to the other side, and they may have five days in which to offer any objections they desire.

Thank you, gentlemen, for the manner in which you presented the case. I will return these to you. I do not think I need it, and it merely encumbers my file. There is one in the file, which is sufficient.

[Endorsed]: Filed June 16, 1954.

[Endorsed]: No. 14399. United States Court of Appeals for the Ninth Circuit. D & H Electric Company, a corporation, Appellant, vs. M. Stephens Mfg., Inc., a corporation, and Jack McLoughlin, doing business as McLoughlin Sales, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: June 21, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14399

D & H ELECTRIC COMPANY, a corporation,
Plaintiff-Appellant,
vs.

M. STEPHENS MFG., INC., a corporation;
JACK McLOUGHLIN, doing business as Mc-
LOUGHLIN SALES; DOE ONE; et al.,
Defendants-Appellees.

APPELLANT'S STATEMENT OF POINTS

Appellant will rely upon the following points on appeal:

1. The trial court erred in holding that defendants were not guilty of infringing United States Letters Patent in suit 2,475,322, and in holding that plaintiff is not entitled to an accounting of damages.

2. The trial court erred in refusing to restrain defendants from infringing United States Letters Patent in suit No. 2,475,322.

3. The trial court erred in finding, concluding and holding that prior patents Adamson 1,494,524; Wilson 1,629,058, Jacobi 1,973,170, and British Patent 22,310 anticipate the claim of the patent in suit, except for the arrangement of the ribs of the patent in suit substantially at right angles to the major axis of the tubular portion of the patented combination.

4. The trial court erred in finding, concluding

and holding that defendants avoided infringement of the patent in suit by making the angularity of the ribs of the accused device from 85° to 89° to the major axis of the tubular portion of said device instead of making them precisely at right angles (90°) to said axis.

5. The trial court erred in finding, concluding and holding that, by file wrapper estoppel or otherwise, the patentees of the patent in suit have so limited the patent claim that the accused device does not infringe.

6. The trial court erred in finding, concluding and holding that the accused device functions in a manner materially different from the manner in which the patented device functions.

7. The trial court erred in finding, concluding and holding that the clause "ribs extending substantially at right angles (90°) to the major axis of said tubular member", as used in the claim of the patent in suit must be so construed that it cannot embrace a construction wherein the ribs are disposed at an angle of from 85° to 89° to said major axis.

Dated this 23rd day of June, 1954.

MASON & GRAHAM,

/s/ By COLLINS MASON,

Attorneys for Plaintiff-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed June 24, 1954. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD

The plaintiff-appellant hereby designates the following identified portions of the record which it deems necessary for consideration of the appeal:

1. Complaint, filed November 17, 1952;
2. Answer and Counterclaim, filed May 28, 1953;
3. Answer to Counterclaim, filed June 1, 1953;
4. The following portions of reporter's transcript: Page 4, lines 1 to 23, inclusive; commencing at page 10, line 13, to and including page 107, line 19; commencing at page 110, line 1, to and including page 157, line 22;
5. The following portions of reporter's separate transcript of proceedings on January 6, 1954, containing opinion delivered orally by the Court, commencing at page 2, line 1, and continuing to page 21, last line, inclusive;
6. Plaintiff's exhibits 1 to 34, inclusive;
7. Defendants' exhibits A to D, inclusive;
8. Findings of Fact and Conclusions of Law, filed March 9, 1954;
9. Final Judgment entered March 9, 1954, filed March 9, 1954;
10. Notice of Appeal;
11. Cost Bond on Appeal;

12. Order Extending Time to Docket Appeal;
13. Concise Statement of Points on Appeal;
14. Stipulation and Order Extending Time to Docket Appeal;
15. Designation of Portions of Record, Proceedings, and Evidence to be Contained in the Record on Appeal (DC);
16. This Designation.

The Clerk of this Court is requested to include in the printed record on appeal the following items above specified: 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15 and 16.

The Clerk of this Court is also requested to prepare ten (10) copies of a book of exhibits, which shall constitute a part of the printed record on appeal, to include the following exhibits: 1, 25, 26, 27, 28.

The remainder of the exhibits are to be treated and handled as physical exhibits.

Dated at Los Angeles, California, this 23rd day of June, 1954.

MASON & GRAHAM,
/s/ By COLLINS MASON,
Attorneys for Plaintiff-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed June 24, 1954. Paul P. O'Brien,
Clerk.

No. 14399

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. & H ELECTRIC COMPANY, a corporation,

Appellant,

vs.

M. STEPHENS MFG., INC., a corporation, and JACK Mc-
LOUGHLIN, doing business as McLoughlin Sales,

Appellees.

APPELLANT'S OPENING BRIEF.

MASON & GRAHAM,
COLLINS MASON,
WILLIAM R. GRAHAM,
811 West Seventh Street,
Los Angeles 17, California,
Attorneys for Appellant.

FILED

NOV 5 1954

PAUL P. O'BRIEN,
CLERK



TOPICAL INDEX

	PAGE
Statement of jurisdiction.....	2
Statement of the case.....	2
The findings of fact.....	6
Specification of errors.....	6
Argument of case.....	8
1. The patent in suit.....	8
2. All the prior art offered by appellees was considered by the Patent Office and shows nothing more than couplings having threads mating with the grooves of the conduit.....	10
3. The claim of the patent in suit is not limited to the coupling having ribs extending precisely at right angles to the major axis.....	12
The law relating to use of term "substantially" in patent claims	13
4. There is no file wrapper estoppel.....	14
5. The accused devices infringe.....	17
The doctrine of equivalents.....	21
Conclusion	22

TABLE OF AUTHORITIES CITED

CASES	PAGE
Angelus Sanitary Can Mach. Co. v. Wilson, 7 F. 2d 314.....	18
Bianchi v. Bardi, 168 F. 2d 793.....	14, 19
Crosley Corp. v. Westinghouse, 52 Fed. Supp. 884.....	13
Curley, Application of, 158 F. 2d 300.....	14
Engineer Co. v. Hotel Astor, 226 Fed. 779.....	14
Graver Tank Co. v. Linde Air Products Co., 339 U. S. 605, 94 L. Ed. 1097.....	21
Hazeltine Corporation v. A. H. Grebe & Co., 21 F. 2d 643.....	14
Matthews v. Allen, 182 F. 2d 824.....	18
Moss v. Patterson-Ballagh Corp., 89 Fed. Supp. 619; aff'd, 201 F. 2d 403.....	14
Musher Foundation, Inc. v. Alba Trading Co., Inc., 150 F. 2d 885	13
Pittsburgh Iron & Steel Foundries Co. v. Seaman-Sleeth Co., 236 Fed. 756.....	14
Pointer v. Six Wheel Corp., 177 F. 2d 153.....	20
Robins v. Wettlaufer, 81 F. 2d 882.....	14
Sanitary Refrigerator Co. v. Winters, 280 U. S. 30, 74 L. Ed. 147	20
Schnitzer v. California Corrugated Culvert Co., 140 F. 2d 275....	16
Stubnitz-Greene Spring Corp. v. Fort Pitt Bedding Co., 110 F. 2d 192	14
Weiss v. R. Hoe & Co., 109 F. 2d 722.....	18

• STATUTES

United States Code, Title 28, Sec. 1292(4).....	2
United States Code, Title 28, Sec. 1338.....	2

N.o 14399.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

D & H ELECTRIC COMPANY, a corporation,

Appellant,

vs.

M. STEPHENS MFG., INC., a corporation, and JACK Mc-
LOUGHLIN, doing business as McLoughlin Sales,

Appellees.

APPELLANT'S OPENING BRIEF.

This is an appeal by the plaintiff below from that part of the District Court judgment [R. 27] which held that the appellees, defendants below, had not infringed the single claim of United States Letters Patent in suit No. 2,475,322 [Ex. 1, R. 189]. The judgment also held the patent to be valid. Appellees have not appealed from that portion of the judgment.

The sole issue involved in this appeal is, therefore, whether the judgment of non-infringement is erroneous; and determination of this issue depends upon whether or not the expression "*substantially at right angles to the major axis*," in the patent claim, must be construed as excluding a slight variation of from 1° to 5° from the right angular.

Statement of Jurisdiction.

This action arises under the patent statutes of the United States [Complaint, R. 3], which is admitted by the defendants [Answer, R. 9]. The District Court's judgment was entered March 9, 1954 [R. 27], and appellant's notice of appeal was filed March 8, 1954 [R. 28]. Jurisdiction of the District Court is founded on Title 28, Section 1338, of the United States Code and jurisdiction of this Court of Appeals is founded upon Title 28, Section 1292(4) of the United States Code.

Statement of the Case.

The patent in suit is for a coupling device used in connecting spiraled flexible conduits (which carry electrical wires) to junction boxes.

Prior to the invention of the patent in suit, coupling devices for this purpose employed *threads which mated* with the spiraled grooves of the conduits. The coupling was simply screwed into the conduit and, to prevent the conduit from escaping from the coupling, either clamping rings were used, or setscrews were threaded through the coupling to bear against the conduit, or a collar was used to bear against and deform the inner end of the conduit. Such prior devices are exemplified by physical Exhibits 8, 9 and 12. Those prior devices, however, gave trouble because the connections would vibrate loose [R. 42, 44, 46] and they presented difficulties in locking the conduit to the coupling device when the latter was mounted in an inaccessible place [R. 44].

The coupling device of the patent in suit overcame those difficulties by using, instead of mating threads, some longitudinally spaced *ribs* arranged in two diametrically opposed groups, and being disposed *substantially* at right

angles to the major axis of the coupling, *the ribs of one group being so staggered relative to the ribs of the other group as to define a spiral whose helical angle is greater than the helical angle formed by the convolutions of the conduit*. In the drawing on page 8 of this brief, this helical angle is illustrated by a diagonal line intersecting one of the upper ribs and the next contiguous lower rib.

By providing such ribs, and so arranging them *relative to each other and relative to the spiral convolutions of the conduit*, it is possible, by relative rotation of the conduit and coupling device, easily to insert the coupling device in the end of the conduit; but, if an attempt is made to remove the device from the conduit by rotation in the opposite direction, the ribs “jam” or grip against the inner surface of the conduit, thus locking the parts together until forcibly separated by a suitable tool [see Column 3, lines 21-57 of the specification of the patent in suit, R. 189].

Appellant (assignee of the patent in suit) has made and sold the patented coupling device since 1946 [R. 40], having sold over four million of them up to the time of trial [R. 50]. Specimens of appellant’s said devices are in evidence as Exhibits 2, 3, 4 and 5. Specimens of the standard flexible conduit are in evidence as Exhibits 13-16, inclusive. It will be seen that each conduit is formed of a strip of metal spirally wound to form spiraled grooves in the nature of threads.

Appellees commenced the alleged infringement in 1951 [R. 105], after seeing appellant’s devices [R. 123]. Exemplars of the accused devices are in evidence as Exhibits 17-22, 33, 34, inclusive.

Appellees base their contention of non-infringement upon the proposition that the patent claim recites that the ribs

of the coupling are disposed “substantially at right angles to the major axis” of the coupling, and that [except as to Ex. 17] appellees avoid the patent claim by disposing the ribs of the accused devices at an angle to the major axis which varies from the right angular only by from one degree in the smallest device to five degrees in the largest device. Appellees urge, in support of this contention, that appellant is estopped by “file wrapper estoppel” to assert that the patent claim covers any coupling device in which the ribs are not disposed *precisely* at right angles (90°) to the major axis of the device [*Findings VIII*, R. 22 and *XII*, R. 25].

As to the accused device of Exhibit 17, appellees concede that the ribs are disposed precisely at right angles to the major axis [Finding XI, R. 24], but, despite the fact that appellant purchased Exhibit 17 in the open market [R. 138], appellees contend that, while they made the devices of Exhibit 17, they passed them out to the trade as samples, and did not sell them.

It is appellant’s contention that there is no such “file wrapper estoppel,” that such an inconsequential variation in the disposition of the ribs from the right angular is embraced within the language “*substantially* at right angles,” and that, in any event, the claim is entitled to such reasonable interpretation under the *doctrine of equivalents*. It is also appellant’s contention that Exhibit 17 should have been adjudged to be an infringement and its further manufacture enjoined, whether or not the accused devices of that construction were sold.

Appellees have failed to produce any prior art which was not cited and considered by the Patent Office during prosecution of the application for the patent, and in none of that art is there any showing or suggestion of the

construction claimed by the patent in suit. On the contrary, the prior art merely discloses couplings having threads, some mutilated and some continuous, which *mate with the convolutions of the conduit*, so that they can be screwed into the conduit *or unscrewed* therefrom with equal ease.

It is submitted that no inference unfavorable to the patent can flow from the fact that the patent contains but a single claim, because the patented device is of simple construction and is amply defined by the single claim. The patent application originally contained several claims, directed to several different species of the invention but, upon requirement by the Patent Office for division, the application was confined to the one species of the patent claim.

There is no conflict in the testimony as to any material matter. Appellant's expert testified that the accused devices are, in every material respect, identical with the structure claimed in the patent [R. 86, 87] and operate in the same manner [R. 91]. The only witness produced by appellees was a Mr. Friedman, an officer of appellee Stephens [R. 110], who did not contradict appellant's expert. He did testify that the ribs of the accused devices provide a "better grip" because they are *thicker* or more raised than the ribs on appellant's commercial couplings [R. 111, 112], but *the patent contains no limitation as to the thickness of the ribs*. Moreover, he testified that he was not an engineer, and confessed that he could only venture an assumption as to how the accused device operates [R. 122-123].

Therefore it cannot be said that the judgment of non-infringement was arrived at by resolving any conflict of testimony. From the findings [R. 19] and the oral opin-

ion of the trial judge [R. 167], it appears that the trial judge arrived at the judgment from his own examination of the file wrapper of the patent in suit [Ex. D], *which is before the Court in this appeal for independent interpretation by this Court*. It is appellant's contention that there is nothing in the file wrapper, or in the patent in suit, which shows or indicates that, in using the term "substantially at right angles" in the patent claim, the patentees intended to exclude any structure in which the ribs vary from the right angular by such an inconsequential amount as one to five degrees.

The Findings of Fact.

Findings I and II are merely jurisdictional. Finding III is immaterial to the judgment since the patent was found to be valid. Findings IV and V merely describe the patent in suit. Findings VI and VII are immaterial to the judgment since the patent was found valid.

The only findings which, if supported by the evidence, would be material to the judgment, are VIII, IX, X, XI, XII and XIII, which will be hereinafter analyzed. It is appellant's position that not only are those findings not supported by the evidence, but that they are directly contrary to the evidence and law.

Specification of Errors.

It is appellant's contention that the District Court erred in each of the following respects:

1. In holding that appellees have not infringed the patent in suit [Pars. 1, 2, 4, 5, 6, 7 of Statement of Points on Appeal; R. 185].

2. In holding that the word "substantially" in the patent claim is not to be interpreted to include a varia-

of 1° to 5° [Findings VI, R. 21, VIII, R. 22 and I R. 25, and Pars. 4-7 of Statement of Points].

In holding that, by virtue of the proceedings in the Patent Office during the prosecution of the application for patent in suit, the patentees estopped themselves from contending that the term "substantially at right angles to major axis," can be construed as covering a slight variation from the right angular of from 1° to 5° , which variation produces no change in operation [Findings VI, R. 21, VIII, R. 22 and XII, R. 25], and Par. 5 of Statement of Points.]

4. In finding that the outside diameter of appellees' coupling is greater than the inside diameter of the normal conduit, and produces a different mode of operation [Findings IX, R. 23; and Par. 6 of Statement of Points.]

5. In finding that, since the patented device and the accused device attain an old result of securing a conduit coupling there cannot be infringement although, in comparing the accused device and the patented device, that end result is obtained by means entirely different from the means used in the prior art [Finding X, R. 24; and Pars. 1 and 2 of Statement of Points].

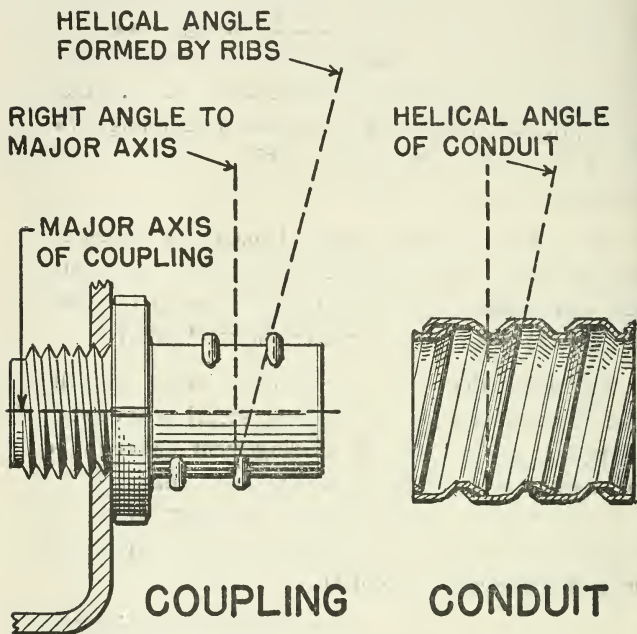
6. In failing to decree infringement and injunctive relief as to Exhibit 17 [Finding XI, R. 24; and Pars. 1-7 of Statement of Points].

7. In finding that the accused couplings have ribs which are at a 2° to 6° angle to the *longitudinal axis* of the coupling, and in finding that the accused devices do not have ribs substantially at right angles to the major axes of the couplings [Finding XIII, R. 25; and Pars. 1 and 7 of Statement of Points].

ARGUMENT OF CASE.

1. The Patent in Suit.

The coupling device of the patent in suit is illustrated by the following drawing:



It comprises a tubular member 1 whose inner end 9 is externally threaded so that it can be screwed in a journal box, as by a nut, and its outer end is provided with external ribs arranged in two groups, the top group consisting of two ribs and the bottom group consisting of two ribs. The ribs of the top group are staggered in relation to the ribs of the lower group and their relative spacing is such that a diagonal line drawn to intersect the end ribs will define a helical angle which is greater than

the helical angle defined by the spiral convolutions of the conduit into which the coupling is to be inserted. The helical angle of the spiral of the conduit is illustrated by a diagonal line intersecting like, but opposite, parts of any two contiguous convolutions of the conduit.

The helical angle formed by the ribs of the coupling, being greater than the helical angle of the convolutions of the conduit, it is possible, by rotation of the coupling device in one direction relative to the conduit, to insert the coupling in the conduit, because the ribs, by engaging the wall of the conduit, tend to unwind or axially extend the conduit (the conduit being axially expandable because its convolutions loosely engage each other), allowing passage of the ribs inwardly along the convolutions of the conduit. However, if rotation in the opposite direction is attempted, the ribs will be brought into jamming or gripping engagement with the inner surface of the conduit, because the conduit is then being axially constricted, or "wound up." (See Col. 3, lines 21-52, of the patent suit.)

The claim of the patent reads as follows:

"In a coupling for spirally wound, flexible conduits, a tubular member having means at one end adapted to be affixed to the wall of a junction box or the like, the other end of said coupling being insertable within the end of a conduit and having a series of ribs extending substantially at right angles to the major axis of said tubular member and adapted to engage the convolutions of the conduit, said ribs being sequentially disposed in staggered relation along the outer surface of the conduit-engaging portion of said coupling so as to define a spiral having a greater helical angle than the normal helical angle of the convolutions of the conduit."

Appellant's expert, Mr. Berry, testified from drawings of the patented couplings and of the accused couplings, as well as from the physical devices [Exs. 25-28, R. 192-195, Exs. 1-4, 17-22, 33, 34]. See his testimony as follows:

“Q. Now, what is the purpose of the spacing of the ribs which you have described relative to the helical angle formed by the convolutions of the conduit? A. It is manifestly for the purpose of effecting a wedge engagement between the ribs of the coupling and the internal channels of the conduit.

Q. Now, in order to obtain the free entry of the coupling into the conduit and then have it become locked in the manner which has been demonstrated here, what are the elements shown in those drawings which are essential to the operation? A. The relative spacing of the ribs, plus their greater helical angle relative to the helical angle of the spirals of the conduit.”

This was not controverted by appellees. It is clear, therefore, that the augularity of the ribs to the major axis is not critical.

2. All the Prior Art Offered by Appellees Was Considered by the Patent Office and Shows Nothing More Than Couplings Having Threads Mating With the Grooves of the Conduit.

There being no issue of validity involved in this appeal, no extended discussion of the prior art is necessary. However, the remoteness of the prior art [Ex. C] shows that it could not form the basis of any file wrapper estoppel and shows that the structure claimed by the patent in suit is broadly new.

The prior art offered by appellees was cited and considered by the Patent Office, and consists of the following patents, all included in the volume [Ex. C]:

Adamson	1,494,524
Wilson	1,629,058
Jacobi	1,973,170
Tiefenbacher	1,830,250
Hunter	1,775,128

Each of those patents shows conventional *threads* which *mate* with the spiral of the grooves of the conduit. Some of them show continuous threads and others show conventional interrupted threads. Interrupted threads are commonly used where it is desired to quickly thread two members together. That is, the male threaded member is inserted into the female threaded member until the threads are in alignment, and then the threads are meshed by simply turning the male member a half or quarter revolution [R. 152]. However, they do not effect any jamming or locking action.

It is to be noted that, in none of the prior art, is there any showing or suggestion of providing ribs and so spacing and staggering them *in relation to the spiral of the conduit* that they define a helical angle greater than the helical angle of the convolutions of the conduit.

Even if the interrupted threads of the prior art could be considered as “ribs,” still they lack the jamming or locking function provided by arranging them to produce this *greater* helical angle, so essential in the patented structure.

3. The Claim of the Patent in Suit Is Not Limited to the Coupling Having Ribs Extending Precisely at Right Angles to the Major Axis.

Appellant submits that there is no sound basis for the holding of the trial court that, in using the term “substantially at right angles to the major axis” in the claim of the patent in suit, the patentees precluded themselves from contending that the accused device, *which provides all the advantages of the invention*, avoids infringement by simply varying that angle by 1-5 degrees.

In writing the claim, the patentees were distinguishing the composite structure from couplings assemblies having *conventional mating threads*, and the statement must be construed in conjunction with the other elements of the claim, reading:

“said ribs being sequentially disposed in *staggered* relation along the outer surface of the conduit-engaging portion of said coupling so as to define a spiral having a *greater helical angle than the normal helical angle of the convolutions of the conduit*.”

As appellant's expert testified [R. 86], the essence of the novelty of the patent resides in this prescribed disposition of the ribs which produces this relatively greater helical angle; and the angular relation of the ribs to the major axis does not alter the helical angle which they form [R. 91].

There is nothing in the patent specification to indicate that there is anything critical in having the ribs disposed *precisely* or *essentially* at right angles.

The mere fact that the patentees stated that the ribs are disposed “substantially” at right angles, must presuppose that some tolerance or variation was intended.

The Law Relating to Use of Term "Substantially" in Patent Claims.

In fact, the word "substantially" is always implied in a patent claim, whether used or not, so as to give protection against minor technical departures.

Musher Foundation, Inc. v. Alba Trading Co., Inc., 150 F. 2d 885, 889.

In the latter case, Judge Learned Hand said:

" . . . 'substantially' is not of itself fatal to a claim; *Eibel Process Co. v. Minnesota & Ontario Paper Company*, 261 U. S. 45, 65: indeed it must always be implied in every claim, even when not introduced, and adds nothing when it is. Were this not true, few patents could give any protection for some departures from the precise disclosure are nearly always possible without losing the benefit of the invention. . . . Finally, 'substantially free of fibres' means 'filtered' or 'centrifuged' (p. 2, col. 1, lines 60, 61; lines 74, 75). It is impossible to suppose that anyone who really wishes to respect the patent would have any difficulty in identifying what the claim covered."

The Courts recognize that the word "substantially" is used in patent claims to prevent literal avoidance of infringement by minor changes.

Crosley Corp. v. Westinghouse, 52 Fed. Supp. 884 (D. C. W. D. Pa.).

A careful review of the decisions shows that the courts, practically unanimously, have interpreted use of the word "substantially" in patent claims as denoting that some tolerance or variation is intended, so long as it is not

enough variation to lose the benefits of the inventive concept.

- Moss v. Patterson-Ballagh Corp.*, 89 Fed. Supp. 619, 627, Affd. 201 F. 2d 403 (9th Cir.);
Bianchi v. Barili, 168 F. 2d 793, 799 (9th Cir.);
Application of Curley, 158 F. 2d 300, 304 (C. C. P. A.);
Engineer Co. v. Hotel Astor, 226 Fed. 779, 781, (D. C. S. D. N. Y.);
Hazeltine Corporation v. A. H. Grebe & Co., 21 F. 2d 643, 645 (D. C. E. D. N. Y.);
Pittsburgh Iron & Steel Foundries Co. v. Seaman-Sleeth Co., 236 Fed. 756 (D. C. W. D. Pa.);
Robins v. Wettlaufer, 81 F. 2d 882, 892 (C. C. P. A.);
Stubnitz-Greene Spring Corp. v. Fort Pitt Bedding Co., 110 F. 2d 192, 198 (6th Cir.).

Appellees have not made any showing whatsoever to the effect that the slight variation of the angle of their ribs from the right angular produces any difference in operation. Appellant's expert testified [R. 91] that the only difference it could possibly make would be to cause the ribs to engage the walls of the conduit convolutions *a moment quicker*. That, however, only affects the relative efficiency of the accused devices, not their mode of operation.

4. There Is No File Wrapper Estoppel.

Findings VIII [R. 22] and XII [R. 25] disclose that the trial judge based his ruling of non-infringement upon his own interpretation of the file wrapper of the patent in suit [Ex. D].

Those findings also indicate that the trial judge based his holding upon his interpretation of the file wrapper

proceedings relating to claim 2 of the application (which matured as the claim of the patent), and claim 10 of the application, which was canceled.

Analysis of the file wrapper discloses the following facts: In its first action, the Patent Office held that the application showed and claimed three different inventions and required division. In the first response by the patentees, they canceled most of the claims because of the requirement for division, and amended claim 2, as follows: In its original form, claim 2 merely referred to the ribs as "radially extending," which was amended to read that the ribs extended "substantially at right angles to the major axis." Also, as originally filed, claim 2 did not recite the staggered relationship of the ribs, and was amended to recite said staggered relationship. With that amendment, the patentees presented the following argument:

"Claim 2 as amended is believed to be allowable in defining the tubular member as having a series of ribs extending substantially at right angles to the major axis thereof and disposed in staggered relation to define a spiral having a greater helix angle than the normal helix angle of the conduit."

In the next Patent Office action, claim 2 was *allowed* and claim 10 was rejected. In responding to that action, the patentees amended claim 10 to read as follows:

"10. A device for providing an end of a spirally wound, flexible conduit with a means of attachment to an object comprising, a tubular member having means at one end adapted to be connected to said object and means at the other end adapted to be interiorly engage a plurality of convolutions of said conduit and incident to such engagement to effect a

stretching action between adjacent convolutions so engaged, said last named means including a series of ribs on the exterior of said tubular member adapted to engage the convolutions of the conduit, and define a spiral having a greater helical angle than the normal helical angle of the convolutions of said conduit.”

It will be observed that said claim 10 was couched largely in terms of *function* and failed to recite the staggered arrangement of the ribs so necessary to cause them to define a helical angle greater than that of the conduit. Nor did it recite the substantially right angular arrangement of the ribs. *If it had been amended to specify these structural elements, it would have been in substance the same as claim 2 which had already been allowed.*

In the next Patent Office action, said claim 10 was again rejected and was then canceled, the patent being passed to issue with the allowed claim 2.

Nowhere in the prosecution of the application for the patent was anything said which signified that the term “substantially at right angles” in the claim had any critical significance; and nowhere was it argued, as recited in finding VIII, that the only novelty in the claim was the substantially right angular disposition of the ribs. The Patent Office never at any time criticized or interpreted the use of the term “substantially.”

As shown by the oral opinion [R. 167], in making its interpretation of the file wrapper, the trial court cited, as authority, the case of *Schnitzer v. California Corrugated Culvert Co.*, 140 F. 2d 275 (9th Cir.). However, an examination of the opinion in that case shows that the facts were not at all analogous to those of the instant case. There, the patent was for a combination of elements one of which was a packing specified in the claim

s having a flange frictionally retained in a groove, the engagement of the flange in the groove serving to retain it in place. Such a packing was known as a "hat" packing because the flange was similar to the brim on a hat. However, in the accused device there involved, a U- or V-shaped packing was used which had no such flange and which was held in place by the pressure of the water upon the two lips of the V. The evidence in the case showed that there was a generally recognized material distinction between "hat" packings and U or V packings. The file wrapper of the patent involved showed that, to overcome rejection of the patent claim, the patentee argued to the effect that a prior art patent (which showed a U-shaped packing) did not show a packing having a flange clamped in a groove, and avoided the rejection by this argument. Consequently, the patentee there was clearly estopped to contend that the U-shaped packing used by the defendant, and having a counterpart in the prior art, was the equivalent of a packing having the flange as specified in the patent claim.

5. The Accused Devices Infringe.

The accused devices are in evidence as Exhibits 17-22, 33 and 34 and are compared with the patented couplings in drawing Exhibits 25-28 [R. 192-195]. They are all substantially the same, except for size.

Those exhibits, and the testimony of appellant's expert, Mr. Berry, show that the accused devices have ribs which vary from the right angular (to the major axis) by only 1 to 5 degrees, and which are sequentially disposed in staggered relation along the outer surface of the coupling so as to define a spiral having a greater helical angle than the normal helical angle of the convo-

lutions of the conduit. There is no issue as to what is meant by a “normal” conduit [see Finding IX, R. 23].

Appellant’s expert testified that the relative spacing of the ribs, and the helical angle formed by the spacing in relation to the conduit, are the same as in the patented couplings [R. 86, *et seq.*]; that the ribs of the accused devices are substantially at right angles to the major axis (the slight variation from the right angular not affecting the function or mode of operation) [R. 93]; and that the accused devices and the patented device function in the same manner [R. 91]. He further testified that the only possible effect of the slight variation from the right angular in the disposition of the ribs of the accused devices would be that the ribs could possibly engage the wall of the conduit slightly quicker, which, however, does not affect the mode of operation [R. 91].

Appellees offered no evidence to contradict this showing. Appellees’ only witness, Mr. Friedman, testified that because the ribs of the accused devices are slightly thicker than the ribs of appellant’s *commercial product*, they get a “better grip”; but Mr. Friedman concedes that he was not an engineer and could only guess as to how the accused devices function [R. 122-123]. Moreover, as pointed out hereinbefore, the claim of the patent in suit does not specify any particular thickness of the ribs, and, in any event, it does not avoid infringement to make an accused device more or less efficient than a patented device.

Matthews v. Allen, 182 F. 2d 824, 828 (4th Cir.);

Weiss v. R. Hoe & Co., 109 F. 2d 722, 726 (2d Cir.);

Angelus Sanitary Can Mach. Co. v. Wilson, 7 F. 2d 314, 318 (9th Cir.).

FINDING IX.

There is *no* evidence to support finding IX [R. 23], to the effect that “the outside diameter of defendants’ couplings is greater than the inside diameter of the normal conduit” causing the defendants’ coupling to operate in a mode different from plaintiff’s. It may be that this relates to the testimony of Mr. Friedman that the accused couplings were thicker and thus obtained a “better grip,” but as pointed out hereinbefore, that does not affect the mode of operation.

FINDING XIII.

Also, Finding XIII [R. 25], to the effect that the ribs on the accused devices are at 2° to 6° angle to the *longitudinal axis* of the couplings, is directly contrary to the evidence. See Exhibits 17-22, 33, 34 and Exhibits 25-28. What that finding probably intended was that said ribs were *oriented from the right angular* by 2° to 6°. That part of the finding which recites that the accused couplings do not have ribs disposed “substantially at right angles” to the major axis is contrary to law and contrary to the undisputed testimony of appellant’s expert, is hereinbefore pointed out.

This Court, in discussing infringement in *Bianchi v. Marili*, 168 F. 2d 793, 801 (9th Cir.), said:

“It is also a question of substance, and not of nomenclature. It is not to be settled by striving to ascertain the difference between tweedledum and tweedledee.

“In *Hydraulic Press Mfg. Co. v. Williams, White & Co.*, 7 Cir., 165 F. 2d 489, 492, the court said:

“In determining the question of infringement, the court is not to judge about similarities or differences

by the names of things, but is to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it. [Case cited]

* * * One does not escape infringement by providing a single element which fully responds to a plurality of elements in the patent. [Case cited]'

"So here, Bianchi did not escape infringement by putting all his cutters on one roller, for he thereby was 'providing a single element which fully responds to a plurality of elements [*i. e.*, two cutting rollers] in the patent'. Indeed, as we have already noticed, Bianchi himself conceded that the rollers can be put 'any way you want to.'

"Nor need the substantial indentity between the two machines be demonstrated to a mathematical certainty. In *City of Grafton, W. V., v. Otis Elevator Co.*, 4 Cir., 166 F. 2d 816, 821, the following language was used:

"'Rarely do we find an example of what might be called perfect infringement. No patent infringer would be so silly as to make and vend a device similar in every minute detail to a patent. Infringement connotes, between the patent and the accused device, merely correspondence as to the substantial, dominate and essential elements. Any other view would make of a patent a foolish and fatuous thing.'"

See also:

Pointer v. Six Wheel Corp., 177 F. 2d 153, 162 (9th Cir.);

Sanitary Refrigerator Co. v. Winters, 280 U. S. 30, 74 L. Ed. 147.

The Doctrine of Equivalents.

Even if, because of the use of the word “substantial” in the patent claim, it could properly be said that the accused devices are not strictly within the language of the claim, still it is the policy of the courts to preserve to patentees the benefits of their inventions by applying the doctrine of equivalents. As said in *Graver Tank Co. v. Linde Air Products Co.*, 339 U. S. 605, 94 L. Ed. 1097, 1101:

“In determining whether an accused device or composition infringes a valid patent, resort must be had in the first instance to the words of the claim. If accused matter falls clearly within the claim, infringement is made out and that is the end of it.

“But courts have also recognized that to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. Such a limitation would leave room for—indeed encourage—the unscrupulous copyist to make unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim, and hence outside the reach of law. One who seeks to pirate an invention, like one who seeks to pirate a copy-righted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement. To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form. It would deprive him of the benefit of his invention and would foster concealment rather than disclosure of inventions, which is one of the primary purposes of the patent system.

“The doctrine of equivalents evolved in response to this experience. The essence of the doctrine is that one may not practice a fraud on a patent. Originating almost a century ago in the case of *Winans v. Denmead* (US) 15 How 330, 14 L ed 717, it has been consistently applied by this Court and the lower federal courts, and continues today ready and available for utilization when the proper circumstances for its application arise. ‘To temper unsparing logic and prevent an infringer from stealing the benefit of the invention’ a patentee may invoke this doctrine to proceed against the producer of a device ‘if it performs substantially the same function in substantially the same way to obtain the same result.’ *Sanitary Refrigerator Co. v. Winters*, 280 US 30, 42, 74 L ed 147, 156, 50 S Ct 9.”

Conclusion.

Appellant respectfully submits that since the patent in suit has been declared valid, and since the holding of non-infringement is predicated upon findings unsupported by the evidence, the judgment should be reversed.

Respectfully submitted,

MASON & GRAHAM,

COLLINS MASON,

WILLIAM R. GRAHAM,

Attorneys for Appellant.

No. 14399.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

D & H ELECTRIC COMPANY, a corporation,

Appellant,

vs.

M. STEPHENS MFG., INC., a corporation, and JACK Mc-
LOUGHLIN, doing business as McLoughlin Sales,

Appellees.

APPELLEE'S BRIEF.

C. G. STRATTON,

LOUIS M. WELSH,

210 West Seventh Street,
Los Angeles 14, California,

*Attorneys for Appellee,
M. Stephens Mfg., Inc.*

FILED

JAN 5 1955

**PAUL M. O'BRIEN,
CLERK**

TOPICAL INDEX

	PAGE
I.	
Statement of jurisdiction.....	1
II.	
Question presented	1
III.	
Summary of argument.....	2
IV.	
Argument.....	3
A. Unless "clearly erroneous," the trial court's findings will not be disturbed on appeal.....	3
B. The evidence supports the court's finding that appellant's coupler is not "equivalent" to the teaching of the patent in suit	4
1. The "means" used is different.....	5
2. Patent limited to right angle.....	6
3. The "operation" is different.....	9
4. The "result" is old.....	9
V.	
Conclusion	10

TABLE OF AUTHORITIES CITED

CASES	PAGE
Edwards v. Hychex, 171 F. 2d 259.....	4
Ganter v. Unit Venetian Blind, 89 Fed. Supp. 479.....	4
Graver Tank and Mfg. Co. v. Linde Air Products, 339 U. S. 605, 70 S. Ct. 854, 94 L. Ed. 1097.....	3, 4
Hazeltine Research v. Admiral Corp., 183 F. 2d 953.....	4
Jacuzzi v. Berkeley Pump Co., 191 F. 2d 632.....	3
Leishman v. General Motors, 191 F. 2d 522; cert. den., 342 U. S. 943.....	3, 4
Moss v. Patterson-Ballagh Corp., 89 Fed. Supp. 619; aff'd, 201 F. 2d 403.....	6
Musher Foundation v. Alba Trading Co., 150 F. 2d 885.....	8
Patterson-Ballagh Corp. v. Moss, 201 F. 2d 403.....	3, 4
Schnitzer v. California Corrugated Culvert Co., 140 F. 2d 275....	6
Simons v. Davidson, 106 F. 2d 518.....	4

RULES

Federal Rules of Civil Procedure, Rule 52(a)	1, 3
--	------

No. 14399.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

D & H ELECTRIC COMPANY, a corporation,

Appellant,

vs.

M. STEPHENS MFG., INC., a corporation, and JACK MC-
LOUGHLIN, doing business as MCLOUGHLIN SALES,

Appellees.

APPELLEE'S BRIEF.

I.

STATEMENT OF JURISDICTION.

Appellee concedes that both the District Court and the Court of Appeals have jurisdiction of this case. We hereby adopt, as our own, Appellant's statement of jurisdiction.

II.

QUESTION PRESENTED.

The question presented to this court is simply whether or not the trial court's Findings of Fact are "clearly erroneous" within the meaning of Rule 52(a), Federal Rules of Civil Procedure.

III.

SUMMARY OF ARGUMENT.

Appellee respectfully submits that far from being “clearly erroneous,” the Findings of the trial court are the only ones consistent with the evidence. The record discloses that the accused device achieves an old result by a *means* and an *operation* different from that taught in the patent in suit. The patent teaches the disposition of ribs at “substantially right angles” to the axis of the sleeve. The accused device, on the other hand, contains interrupted threads which are disposed at varying degrees from the right angle ranging from 1° in the smallest coupler to 5° in the largest coupler.

This choice of a different *means* results in an entirely different *operation* or function. The patent describes a jamming or cross-threading operation which has the effect of stretching the conduit lengthwise or axially. [R. pp. 47, 68, 113.] The accused device operates by the simple expedient of inserting a larger object into a smaller one, thus causing an *outward* pressure on the inside of the conduit. [R. pp. 113-114, 122.] In other words, the patented method of operation—the cross-threading or jamming—is not utilized by Appellee’s device. The physical evidence demonstrates that the difference of one to five degrees has the effect of making the accused device “fit” the flex, whereas the whole purpose of the limited patent granted Appellant is to cause the connector to “misfit” the flex.

IV.
ARGUMENT.

A. Unless "Clearly Erroneous," the Trial Court's Findings Will Not Be Disturbed on Appeal.

Findings of patentability, infringement and equivalence, or the absence thereof, are determinations of fact which will not be upset on appeal unless they are "clearly erroneous."

Fed. Rules of Civ. Proc., Rule 52(a);

Graver Tank and Mfg. Co. v. Linde Air Products,
339 U. S. 605, 609-611, 70 S. Ct. 854, 94 L. Ed.
1097;

Jacuzzi v. Berkeley Pump Co., 191 F. 2d 632, 634
(C. A. 9, 1951);

Patterson-Ballagh Corp. v. Moss, 201 F. 2d 403
(C. A. 9, 1953);

Leishman v. General Motors, 191 F. 2d 522 (C. A.
9, 1951), *cert. den.* 342 U. S. 943.

The Supreme Court in the *Graver Tank* case stated at page 609:

"A finding of equivalence is a determination of fact * * *. Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous. Particularly is this so in a field where so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience."

The Court of Appeals for the Seventh Circuit discussed the *Graver Tank* case and then remarked:

“Thus, there is no room longer to doubt that the issues most prevalent in patent litigation, and particularly those of validity or invalidity, infringement or non-infringement, are issues of fact and that a finding by the trial court on such issues is within the terms of Rule 52(a) * * *.”

Hazeltine Research v. Admiral Corp., 183 F. 2d 953, 955.

The *Hazeltine* case was cited with approval by this court in *Leishman v. General Motors*, 191 F. 2d 522.

B. The Evidence Supports the Court's Finding That Appellant's Coupler Is Not "Equivalent" to the Teaching of the Patent in Suit.

To be "equivalent" the accused device must perform substantially the same function in substantially the same way to obtain the same result.

Patterson-Ballagh Corp. v. Moss, 201 F. 2d 403 (C. A. 9, 1953).

The range of equivalents depends upon the degree of invention, and if the patent is for a slight improvement on an old device, the range of equivalents is very narrow. The range of equivalents cannot be extended to cover means which have clear antecedents in the prior art.

Ganter v. Unit Venetian Blind, 89 Fed. Supp. 479 (D. C. Calif., 1950).

If one of the elements of the claim is omitted in the accused device, there is no infringement.

Simons v. Davidson, 106 F. 2d 518 (C. C. A. 9, 1939);

Edwards v. Hychex, 171 F. 2d 259 (C. C. A. 7, 1948).

1. The "Means" Used Is Different.

Appellant's own evidence demonstrates that the D & H coupling and patent require ribs that describe an angle of ninety degrees to the longitudinal axis of the coupling, whereas Appellee's device contains protuberances that vary from one to five degrees off the right angle. Appellant's expert witness, Mr. Berry, testified that the ribs on the D & H coupling extend *perpendicular* to the longitudinal axis. [R. p. 83.] This same witness introduced Plaintiff's Exhibits 26, 27 and 28, which reveal that Appellee's couplers vary 3.5° , 2° and 5° respectively, from the perpendicular. [R. p. 90.] Appellant's witness Horton later testified that the smallest coupling manufactured by Appellee formed a right angle to the axis of the sleeve. But after the court pointed out to the witness that he could clearly see the angle, Appellant's Counsel measured the device and found it to be one degree. [R. pp. 140-141.] Appellee's witness Friedman testified that the ribs on his device are about $3\frac{1}{2}$ degrees off the right angle.

But appellant maintains that since the single claim allowed by the Patent Office uses the phrase "substantially at right angles," there is infringement. The trial judge found that the word "substantially," as used in the claim, "* * *" is intended to take care of such tolerances as may be allowed in the construction of devices which are not in the realm of precision devices and the construction of precision instruments." [R. p. 181, see also p. 100.] The evidence and all reasonable inferences therefrom supports this conclusion.

In *Moss v. Patterson-Ballagh Corp.*, 89 Fed. Supp. 619, 627 (D. C., S. D. Cal.), *aff'd* 201 F. 2d 403 (C. A. 9, 1953), Judge Weinberger stated:

“The word ‘substantially’ is a relative term and should be interpreted in accordance with the context of the claim in which it is used.”

2. Patent Limited to RIGHT ANGLE.

This court in *Schnitzer v. California Corrugated Culvert Co.*, 140 F. 2d 275, 276, held:

“Where the claim uses broader language than the specifications, reference may be had to the latter for the purpose of limiting the claim * * *.

“The file wrapper contains evidence that the inventor understood this element of his claim in the narrower sense. * * * the proceedings [before the Patent Office] may be used to aid in construing the claim, * * *.”

With this background, let us examine the Record.

First, we find the following in the specifications of the patent itself:

“Disposed on the outer surface of the sleeve, 1 is a series of protuberances 3, 4, 5 and 6, in the form of ribs extending for short distances on the sleeve in a direction *at right angles* to the axis of the sleeve. * * *” (Emphasis supplied.) [Pltf. Ex. 1, Col. 2, line 37, *et seq.*]

Thus, under the rule laid down in *Schnitzer*, it becomes quite apparent that “substantially” has the meaning attributed to it by the trial judge.

Second, the file wrapper [Def’t. Ex. D], discloses that the patentee understood his invention to consist of the disposition of ribs *at right angles*—not interrupted screw

threads *at angles*. In a letter to the Patent Office, Appellant's Patent Counsel and expert witness, Mr. Berry, wrote as follows:

"The other references show interrupted screw threads and do not teach applicant's arrangement of ribs which are extended *at right angles* to the axis of the coupling. In other words, applicant's ribs cannot be likened to screw threads as they perform an entirely different function entirely beyond the concept of any of the references.

"Reconsideration of claims 10, 11, 14 and 16 is respectfully requested inasmuch as each of these claims define the novel ribs extending *at right angles* to the axis of the sleeve a distance less than one-half of the circumference of the sleeve. This feature is not shown nor suggested by any of the references. As pointed out the secondary references merely show interrupted screw threads and applicant's ribs cannot be likened to such screw threads." (Emphasis supplied.)

With this letter, Mr. Berry proposed the change in the wording of the claim which contains the phrase "substantially at right angles." It is, therefore, quite obvious that the use of the word "substantially" was not intended to tolerate variations of from one to five degrees off the horizontal.

Third, the patentee elected to prosecute claims drawn to the invention as shown in Figure 2 [Def't. Ex. D]. Figure 2 shows the ribs to be at right angles [Pl'tf. Ex. 1].

Fourth, the prior art, and the correspondence from the Patent Office demonstrates that the claim was allowed because of the right angle ribs, and for no other reason. The Wilson Patent, No. 1,629,058 [Def't. Ex. C], reveals that ribs, or interrupted threads which are a few de-

grees off the perpendicular are old in the art. [Ribs 18 in Figure 2.]

Fifth, in the manufacture of an article of this sort, one generally expects some variation, since it is not a precision instrument. Hence, the word “substantially” is used to cover such minor deviations. This is somewhat illustrated by the testimony of Appellant’s expert witness, Mr. Berry, who used the word “materially” to describe variations greater than the thickness of a pencil line. The witness stated that his calculations “* * * might fluctuate perhaps the thickness of a pencil line, but not *materially*.” [R. pp. 84-85.]

Sixth, if the patent were construed to include the type of device manufactured by Appellee, then it would be clearly invalid, as having been anticipated by the prior art [see especially figure 2 of Wilson, 1,629,058, Deft. Ex. C]. The opinion of the trial court clearly demonstrates that the patent was held valid *only* because of the narrow construction which limits the range of equivalents to those devices whose ribs or protuberances are, to all intents and purposes, at right angles. The patent would be invalid if construed to cover Appellee’s device.

On page 13 of his brief, Appellant’s Counsel quotes from an opinion by Judge Learned Hand in *Musher Foundation v. Alba Trading Co.*, 150 F. 2d 885, 889. There, the learned Judge remarks that the word “substantially” adds nothing to a patent claim, but merely expressly states that which is always implied, namely, that slight variations *that do not lose the benefit of the invention*, may constitute infringement. The benefit, if any, of Appellant’s invention is the locking by jamming or cross-threading. We will see presently that this benefit is entirely lost by changing the angle of the protuberance.

3. The "Operation" Is Different.

The evidence amply supports the trial court's finding that the accused device does not operate on the patented principle. The object of the invention is to connect flexible conduit to an electrical junction box by jamming or cross-threading, thus stretching the conduit axially. [Patent in suit, Pltf. Ex. 1, Col. 1, lines 18-31; R. pp. 47, 68, 113.] The accused device does not jam, cross-thread or stretch the conduit axially. To the contrary, Appellee's couplers exert an outward pressure, thus causing a "tight fit." [R. pp. 113-114, 122.] Appellee's operation merely follows the Hunter patent, No. 1,775,128. [Deft. Ex. C; R. p. 154.]

Appellant offered no evidence on this issue. Their expert witness, Mr. Berry, testified that he had conducted no experiments to determine what happens to the ribs on the inside of the conduit. [R. p. 101.] Fortunately, however, the couplers are made of zinc, a softer metal than the steel conduit, and scratches on the ribs of the couplers demonstrate the difference in the operation of the two couplers. [R. pp. 112-113, 79-80.] Plaintiff's Exhibit 3, the patented coupling, shows abrasions on the ends of the two ribs indicating the places where they have been jammed into the flex. Plaintiff's Exhibit 18, one of the accused devices, shows abrasive markings all along the upper surface of the ribs, where they have exerted *outward* pressure. [R. pp. 79-80.]

4. The "Result" Is Old.

The result achieved by the patent in suit is no different from that revealed in the prior art. Appellant attempted to show that its device made a tighter fit than the prior devices, but the demonstration of the Jake device per-

formed by witness Friedman, reveals that it accomplishes the same result as does the patent in suit. [R. pp. 117-118.] Appellant also attempted to show infringement by demonstrating that neither its coupler nor appellee's coupler could be removed from the flex without the aid of pliers. However, later in the trial, Mr. Horton removed one of the accused couplers from a newly purchased article, and found that the coupler came out of the flex quite easily by hand operation. [R. p. 142.]

V.

CONCLUSION.

Appellee respectfully submits that the evidence fully supports the trial court's Findings; that the plaintiff failed to sustain its burden of proof on the question of infringement; that the Findings of the trial court are not "clearly erroneous"; and that the patent is invalid if construed to cover Appellee's device.

Respectfully submitted,

C. G. STRATTON,

LOUIS M. WELSH,

Attorneys for Appellee, M. Stephens Mfg., Inc.

No. 14399

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

D & H ELECTRIC COMPANY, a corporation,

Appellant,

vs.

M. STEPHENS MFG. INC., a corporation, and JACK MC-
LOUGHLIN, doing business as McLoughlin Sales,

Appellees.

APPELLANT'S PETITION FOR REHEARING.

MASON & GRAHAM,

COLLINS MASON,

WILLIAM R. GRAHAM,

811 West Seventh Street,

Los Angeles 14, California,

Attorneys for Appellant.

FILED

JAN 16 1956

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

PAGE

When the file wrapper proceedings are construed in the light of the inventive contribution of the patent in suit, the state of the prior art, and the prior decisions of this court, it is clear that the court has denied to appellant a proper application of the doctrine of file wrapper estoppel.....	2
In sustaining the judgment below the court has misconstrued the accused devices and their mode of operation.....	8
The court failed to review the trial court's ruling with respect to the accused device of Exhibit 17.....	13
Conclusion	13

TABLE OF AUTHORITIES CITED

CASES	PAGE
Angelus Sanitary Can Machine Co. v. Wilson, 7 F. 2d 314.....	2
Barrel Fitting & Seal Corporation of America v. American Flange & Mfg. Co., 74 F. 2d 569.....	8
Binney & Smith Co. v. United Carbon Co., 125 F. 2d 255.....	3, 6
Carter Crume Co. v. American Sales Book Co., 124 Fed. 903....	13
Ceramic Process Co. v. General Porcelain Enameling & Mfg. Co., 129 F. 2d 803.....	3
Dietel v. Unique Specialty Corp., 54 F. 2d 359.....	3
Farrington v. Haywood, 35 F. 2d 628.....	3, 12
International Cellucotton Products Co. v. Sterilek Co., Inc., 94 F. 2d 10.....	3
Musher Foundation, Inc. v. Alba Trading Co., Inc., 150 F. 2d 885	7
R. Hoe & Co. v. Goss Printing Press Co., 30 F. 2d 271.....	3, 7
Research Products Co. v. Tretolite Co., 106 F. 2d 530.....	6
Six Wheel Corporation v. Sterling Motor Truck Co. of Cali- fornia, 50 F. 2d 568.....	13
Tampax, Inc. v. Personal Products Corp., 123 F. 2d 722.....	6

No. 14399

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

D & H ELECTRIC COMPANY, a corporation,

Appellant,

vs.

M. STEPHENS MFG. INC., a corporation, and JACK MC-
LOUGHLIN, doing business as McLOUGHLIN SALES,

Appellees.

APPELLANT'S PETITION FOR REHEARING.

Appellant respectfully petitions for a rehearing in this case upon the grounds that, in sustaining the judgment of the trial court, this Court:

1. Has denied to appellant the proper application of the doctrine of file wrapper estoppel which it has applied in prior cases;
2. Has misconstrued the structure and mode of operation of the accused devices of Exhibits 18-22, 33 and 34; and
3. Has failed to review the judgment below with respect to the accused device of Exhibit 17.

When the File Wrapper Proceedings Are Construed in the Light of the Inventive Contribution of the Patent in Suit, the State of the Prior Art, and the Prior Decisions of This Court, It Is Clear That the Court Has Denied to Appellant a Proper Application of the Doctrine of File Wrapper Estoppel.

The effect of the Court's decision is to apply the doctrine of file wrapper estoppel in such a way as to deny to appellant an interpretation of the patent claim which embraces the improvements actually invented and not disclosed in the prior art. This effect is contrary to the doctrine as heretofore defined and applied by this Court. For instance in *Angelus Sanitary Can Machine Co. v. Wilson*, 7 F. 2d 314, 318 (9 Cir.), the Court defined the doctrine as follows:

"Conceding the principle that, by amending, Wilson is limited to the form and language of the claims as allowed, nevertheless, he is not limited to any detailed specific construction to avoid any reference cited against it, *nor is he estopped from claiming by the amended claim every improvement and combination which he has invented and which was not disclosed by those references.* We regard claim 2, in the element of encircling means, as entitled to a construction which includes a fairly liberal range of equivalents. The difference in the use of a mechanical equivalent does not avoid infringement. In *Eibel Process Co. v. Paper Co.*, 261 U. S. 45, 43 S. Ct. 322, 67 L. Ed. 523, the Court, through the Chief Justice, clearly reiterated the doctrine that where an inventor, though not a pioneer in the sense of having created a new art, has made a very useful discovery which has substantially advanced the art, his patent, though but an improvement on an old machine,

may be entitled to liberal treatment. That same principle was applied by this Court in *Smith Cannery Co. v. Seattle Astoria Iron Works* (C. C. A.), 261 F. 87."

The doctrine is likewise defined and applied by other Circuit Courts of Appeal, as shown, for instance, by the following cases:

R. Hoe & Co. v. Goss Printing Press Co., 30 F. 2d 271, 275 (2d Cir.);

International Cellucotton Products Co. v. Sterilek Co., Inc., 94 F. 2d 10 (2d Cir.);

Farrington v. Haywood, 35 F. 2d 628, 630 (6th Cir.);

Ceramic Process Co. v. General Porcelain Enameling & Mfg. Co., 129 F. 2d 803 (7th Cir.);

Binney & Smith Co. v. United Carbon Co., 125 F. 2d 255 (4th Cir.);

Dietel v. Unique Specialty Corp., 54 F. 2d 359 (2d Cir.).

Thus, to properly apply the doctrine to the facts of this case, we must measure what the patentees invented against what was shown by the prior art, Exhibit C.

In essence, the invention is the effecting of self-locking of the coupling device in the conduit by providing the coupling with ribs arranged to have a combination of two characteristics, namely, the ribs must be so disposed in relation to the major axis as not to match the spiral of the convolutions of the conduit, and they must be so staggered and spaced as to define a helical angle greater than that of the conduit.

On the other hand, the prior art merely disclosed couplings having conventional continuous or interrupted

screw threads fitting or mating with the convolutions of the conduit, both as to their angularity to the major axis and as to their helical angle.*

In the preferred specific form of the invention shown in the patent drawing, the ribs are disposed precisely at an angle of 90° to the major axis. However, particularly when the ribs are also spaced and staggered to define the greater helical angle, the angularity of the ribs to the major axis may be varied without changing the mode of operation, so long as that angularity is not the same as that of the convolutions of the conduit. [R. 91.]

The Court apparently predicated its application of the doctrine of file wrapper estoppel upon its interpretation of the file wrapper proceedings [Ex. D] relating to the cancellation of claims 7 and 10 and the amending of claim 2, of the application, which latter claim became the claim of the patent in suit.

It must be borne in mind, however, that, as originally presented in the application, neither of those claims de-

*While, in its opinion, the Court states that the prior art reveals the principle of joining threads or ribs of relatively different helical angles, the opinion does not identify any such art and appellant has been unable to find any such teaching in any of the prior art. It is believed that this statement in the opinion is based upon a misinterpretation of the following statement appearing in prior art patent 1,494,524 (p. 1, line 86 *et seq.*): "*Interrupted threads 12 are provided on an enlarged portion 13 of section 2 and these threads have a pitch less than that of the threads 5.*" However, examination of the patent shows that the quoted statement does not refer to the joining or interengagement *with each other* of two parts having threads of different helical angles. The patent shows two gun-barrel sections 1 and 2 coupled together by a collar 14. While the threads 5 of barrel section 1 have a pitch different from the pitch of threads 12 of section 2, the threads 5 engage with threads in the *collar* having the same pitch as threads 5, while threads 12 of section 2 engage with other threads in the collar having the same pitch as threads 12. That is quite a different thing from interengaging *with each other* threads of different helical angles.

scribed the ribs as such and neither of them in any way defined the angle of the ribs to the major axis. Rather, the claims merely described the ribs in broad, generic terms, as “protuberances” or “means.” Consequently, as the claims were originally presented, they did not in that respect distinguish over the conventional mating screw threads of the prior art.

Since the prior art merely showed conventional mating screw threads, in order for the patentees to distinguish over the prior art it was only necessary to amend the claim to specify the “ribs” and to specify that their angle to the major axis was not such as to match the corresponding angle of the conduit convolutions.

To effect that distinction without unnecessarily limiting the claim to the ribs being disposed precisely at right angles to the major axis, the patentees amended claim 2 to recite “ribs extending *substantially* at right angles to the major axis” and to recite that the ribs were disposed in “staggered relation.” As so used, the term “substantially” was obviously designed to give to the claim the latitude of equivalency which embraced the gap between ribs disposed precisely at right angles and ribs which were disposed at an angle to the major axis which matched the spiral of the convolutions of the conduit.

It is that range of equivalency which the Court has denied to the claim because of what appears to be a misapplication of the doctrine of file wrapper estoppel.

If the claims numbered 7 and 10 of the application had been likewise amended, they would have been in substance the same as the retained claim 2. Consequently, claims 7 and 10 were cancelled.

However, it is well settled in this and other Circuits that the surrender of a broad or generic claim by an inventor does not deprive him of a range of equivalents for a retained narrower claim which is coextensive with the latitude permitted by the disclosures of the prior art.

Binney & Smith Co. v. United Carbon Co., et al., supra;

Research Products Co. v. Tretolite Co., 106 F. 2d 530, 535 (9th Cir.).

In the instant case, that latitude is the difference between a *precisely* right angular disposition of the ribs to the major axis and an angular disposition to the major axis which would match that of the convolutions of the conduit.

A careful study of the cases cited in the Court's opinion on the issue of file wrapper estoppel shows that there is no variance between those cases and the proper rule as above discussed. On the contrary, the facts of those cases were not at all analogous to those here involved. For instance, in the case of *Tampax, Inc. v. Personal Products Corp.*, 123 F. 2d 722, 723 (2nd Cir.), quoted from in the opinion, the inventor used the term "*convoluted*" in the claim. The Patent Office required the inventor to amend to explain what he meant by that term, and, in response to this requirement the inventor amended to recite in detail a particular kind of convolution which was necessary to distinguish over the prior art. The Court, of course, properly held in that case that the claim was limited to that particular kind of convolution.

That the Second Circuit does not limit a patent claim, under the doctrine of file wrapper estoppel, to a greater extent than is necessary to prevent it from being the

same as the prior art, is clearly apparent from the following remarks of Judge Learned Hand in *R. Hoe & Co. v. Goss Printing Press Co.*, *supra*:

“We have repeatedly said that we will not look to the file wrapper for estoppels, except in case the patentee tries to expand his claim by omitting an element which leaves it identical with one which he has abandoned.”

If, in the instant case, the Patent Office had required the patentees to amend to explain precisely what was meant by the term “substantially” and if, in response to that requirement, the patentees had amended to state that it meant that the ribs must be disposed *precisely* at right angles excepting only for such slight variances as might result from imperfections and manufacturing tolerances, the claim properly should be limited to the construction which the Court has given to the claim. *But, of course, the file wrapper does not show any such explanation, limitation or meaning.*

The Courts construe patent claims to embrace such slight variances as might result from imperfections and manufacturing tolerances, *whether or not the claims so state.*

Musher Foundation, Inc. v. Alba Trading Co., Inc., 150 F. 2d 885 (2nd Cir.).

Consequently, when the patentees here inserted the word “substantially” before “right angular” it must be presumed that they meant something *more than* slight variances resulting from imperfections and manufacturing tolerances. Otherwise the word “substantially” would be superfluous in the claim.

Appellant therefore respectfully submits that the term “substantially at right angles” as used in the claim, in

combination with the feature of the greater helical angle, should be construed to embrace a variation from the right angular of the order of 1° to 5° which does not change the mode of operation. If this proper interpretation of the claim is not applied, the effect will be to deprive appellant of the fruits of a useful invention which has advanced the art.

Courts should be careful to avoid application of the doctrine of file wrapper estoppel in a manner to defeat the real discovery which the inventor has contributed to the art.

Barrel Fitting & Seal Corporation of America v. American Flange & Mfg. Co., 74 F. 2d 569, 571 (7th Cir.).

In Sustaining the Judgment Below the Court Has Misconstrued the Accused Devices and Their Mode of Operation.

It is realized that an unusual burden is placed upon the Court in this case in construing the mode of operation of the accused devices. Normally, in a patent case, the Court is able visually to observe the actual operation, but in the instant case that is impossible because flexible conduit cannot be sectioned axially to provide operative demonstration models which can be viewed in all stages of operation, the reason being that, if sectioned, the convolutions will separate. As a result, in the models before the Court the coupling is necessarily concealed within the conduit during the operation which effects the self-locking.

Moreover, while, on its face, the invention might appear to be very simple, in reality the significance of the combination of features and mode of operation which provided the self-locking are difficult for one not particularly

skilled in engineering to understand. Even a skilled mechanic must rely upon meticulous measurements and computations to understand them.

In fact, it is submitted that an examination of the testimony of appellee's only witness, Mr. Friedman, shows that even he did not understand the mode of operation of the accused devices. Admittedly, appellee made its device after seeing appellant's commercial embodiment of the patented invention on the market. [R. 123.] The first device [Ex. 17] made by appellee was an *exact duplicate* of the patented device in every particular. Then, for the purpose of providing a subterfuge upon which to lean if sued for infringement, appellee made the slight but inconsequential change of varying the angularity of the ribs from 1° to 5° from the right angular and by slightly thickening the ribs,* while precisely retaining the other important feature of the combination, namely, the feature of the greater helical angle. Appellee's witness, Mr. Friedman, ventured several different theories as to the mode of operation [R. 122] but admitted that he was unskilled in mechanics [R. 123] and that he had not measured and was not capable of measuring the angles of the ribs [R. 131] and that his conclusions were mere assumptions. [R. 123.] On the other hand, appellant's qualified expert testified that the accused devices functioned by the same mode of operation as did the patented devices [R. 91-93] which testimony he based upon his own meticulous measurements and computations which he translated into illustrative charts. [Exs. 25, 28.] He also testified that particularly since the accused devices utilized ribs arranged to define a greater helical angle,

*The patent claim, however, does not prescribe any specific thickness for the ribs.

the slight variation of 1° to 5° to the right angular did not in any way change the mode of operation. [R. 91.] It is submitted therefore that in a case like this, in which the Court is unable to have its own visual inspection of the mode of operation, the only reliable evidence before the Court as to the mode of operation is that of appellant's qualified expert based upon actual measurements and computations.

In sustaining the judgment of non-infringement, this Court stated, in its opinion, that the accused devices used interrupted screw threads which fit the convolutions of the conduit. However, not only is this conclusion directly contrary to the only competent evidence in the case, but an inspection of the illustrative charts [Exs. 25, 28], the accuracy of which is not questioned, shows that this would be impossible.

For instance, the drawing included in the opinion, which appears to be a reproduction of Exhibit 28, shows that the ribs of the accused device define a 12° helical angle while the convolutions of the conduit only have a 9° helical angle. Obviously it would be impossible for ribs having a 12° helical angle to *fit* convolutions having a 9° helical angle. Also, an inspection of that drawing shows that the ribs of the accused device vary from the right angular by only 3° while the convolutions of the conduit are pitched at 9° . It is clear therefore that those ribs would not mate with or fit the conduit in the manner of a screw thread.

There is a still further reason, pointed out by appellant's expert at R. 96-97, why the ribs of the accused devices cannot function or be considered as interrupted screw threads. That is, that the angle of the slight spiral given to the ribs of the accused device, in relation to

their staggered relationship and spacing, is such that neither of the ribs would align with or intersect an end of either of the other ribs if extended around the coupling in the manner of screw threads, so that each of the ribs would have to be considered separately from the other ribs instead of all the ribs combining to form continuations of a single thread, as would be necessary to enable them to function as a conventional interrupted screw thread.

We find therefore that the only reliable evidence before the Court with respect to the construction and mode of operation of the accused devices shows that the devices of Exhibits 18-32, 33 and 34 combine the substance of the combination of the patent claim in suit and function by the same mode of operation, and therefore clearly infringe.

While the Court, in its opinion, stated that the slight angular variation of the ribs of the accused devices invokes "by appellant's admission, an entirely different principal of operation," the Court failed to point out what it construes to be such an admission and appellant is unable to find any such admission in the record. In fact, if appellant had felt that the mode of operation of the accused devices was different, it would not have taken this appeal at all. The evidence is that the mode of operation is the same, as shown by the following quotation from appellant's expert's testimony at R. 91:

"Now, I have found by demonstration here where I have had these exhibits in my possession for the past week and put (70) them together and took them apart time and time again, that there is no difference in the action, the reason for it being that the angular relation of the rib does not alter its helical angle struck from centers.

“The only possible difference in the action—the *mode of operation is identical*, but in the action, by reason of the rib being at an angle, its leading edge, as compared with one that is perpendicular, could possibly meet with the wall of a convolution of the spiral, let us say, a moment sooner, quicker.”

In *Farrington v. Haywood, supra*, a case involving analogous facts, the patent was for a combination of which one element was a stirrer-blade. As originally presented in the application, the claim merely recited “a stirrer-blade.” As so worded, the claim was rejected on prior art showing collapsible or foldable stirrer-blades. The inventor then amended the claim to recite that the stirrer-blade was “flat” and “substantially rigid.” The accused device used the combination but used a stirrer-blade which was not rigid, although it functioned to some extent as a rigid blade. In holding infringement, the Court said:

“There was obviously no intention upon his (the patentee’s) part to limit his claim beyond what was necessary to distinguish the devices of the prior art and the language used does not so require. Under these circumstances this Court has frequently held that infringement is not avoided by a purely literal departure from the apparent limitation of the claims (citing cases). Under frequently arising normal conditions, one end of the defendant’s stirrer bar is pivoted to one head and the other end is located adjacent the hole and said bar is insertible through the bunghole. At such times it is functionally and operatively integral and ‘substantially rigid.’ There is a substantial identity of form and method of operation with only ‘such variations as are consistent with its being in substance the same thing.’ *Burr v. Duryee*, 1 Wall. 531, 573, 17 L. Ed. 650; *Sanitary Re-*

frigerator Co. v. Winters (decided October 14, 1929), 50 S. Ct. 9, 74 L. Ed. It will therefore infringe at some stage of its operation. It is unnecessary that it infringe at all stages.”

The Court Failed to Review the Trial Court’s Ruling With Respect to the Accused Device of Exhibit 17.

The accused device of Exhibit 17 was purchased by appellant in the open market [R. 138], and appellee admits that he made those devices and passed them to the trade, although he claims to have passed them out only as “samples.” [R. 106]. Exhibit 17 conforms in precise detail to the claim of the patent in suit, the ribs not varying in the slightest from the right angular. In view of appellee’s statement that he made and distributed the devices of Exhibit 17 as “samples,” but did not sell them, the trial court held that they did not infringe.

A patent gives the patentee the right to exclude others from making, using or selling the patented item. (*Six Wheel Corporation v. Sterling Motor Truck Co. of California*, 50 F. 2d 568 (9th Cir.)), and, merely making a patented item without selling it is an infringement.

Carter Crume Co. v. American Sales Book Co.,
124 Fed. 903.

Conclusion.

It is respectfully submitted therefore that a rehearing will avoid a serious miscarriage of justice.

Respectfully submitted,

MASON & GRAHAM,

COLLINS MASON,

WILLIAM R. GRAHAM,

Attorneys for Appellant.

Certificate of Counsel.

I, Collins Mason, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

COLLINS MASON,
Attorney for Petitioner.

No. 14399

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

D & H ELECTRIC COMPANY, a corporation,

Appellant,

vs.

M. STEPHENS MFG., INC., a corporation, and JACK Mc-
LOUGHLIN, doing business as McLoughlin Sales,

Appellees.

BRIEF OF APPELLEES RE APPELLANT'S PETITION FOR A REHEARING.

C. G. STRATTON,

LOUIS M. WELSH,

210 West Seventh Street,

Los Angeles 14, California,

Attorneys for Appellees.

FILED

FEB -8 1936

PAUL A. D'AMICO, CLERK



TOPICAL INDEX

	PAGE
Spacing of the ribs.....	2
Appellees use interrupted threads.....	3
Expert testimony	3
File wrapper estoppel.....	5
Re samples	8
Conclusion	9

TABLE OF AUTHORITIES CITED

CASES	PAGE
Angelus Sanitary Can Machine Co. v. Wilson, 7 F. 2d 314.....	5, 6
Carter Crume Co. v. American Sales Book Co., 124 Fed. 903.....	8
Hoe and Co. v. Goss Printing Press Co., 30 F. 2d 271.....	6
National Hollow Brake Beam Co. v. The Interchangeable Brake Beam Co., 106 Fed. 693.....	5
Schnitzer v. The California Corrugated Culvert Co., 140 F. 2d 275	6, 7
Solomon v. Renstrom, 150 F. 2d 805.....	4
Tampax, Inc. v. Personal Products Corp., 123 F. 2d 722.....	2, 6
Texas Co. v. Anderson-Pritchard Refining Corp., 122 F. 2d 829	2

No. 14399

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

D & H ELECTRIC COMPANY, a corporation,

Appellant,

vs.

M. STEPHENS MFG., INC., a corporation, and JACK Mc-
LOUGHLIN, doing business as McLOUGHLIN SALES,

Appellees.

BRIEF OF APPELLEES RE APPELLANT'S PETITION FOR A REHEARING.

Appellees submit that this Honorable Court's construction of appellant's claim is proper, and is indeed the only construction which can be justified. Both the patent and the file wrapper reveal that the patentees consider that their invention consisted of ribs at right angles. The broader construction suggested by appellant would render the patent invalid.

The statement of the invention made by this Court in its recent opinion in this case accurately defines the disclosure of the patent as it is claimed. This Court stated that the patent in suit

“ . . . covers a combination of elements in a tubular member that has (a) a series of ribs extending substantially at right angles to its major axis, and (b) said ribs defining a spiral having a greater helical

angle than the normal helical angle of the convolutions of the conduit.”

Each of these characteristics will now be separately considered.

Spacing of the Ribs.

Appellant argues that the difference between the 9° helical angle of the conduit and the 12° helical angle of the one-inch coupling is *ipso facto* proof of a misfit. The figures taken by appellant are extreme, for by the testimony of its own expert, the helix angle of this coupling is *either* 10° *or* 12°, and not necessarily 12°. There is no showing in the record that a 90° conduit would be expanded longitudinally by a 10° coupling. The difference is too slight; there is more “play” than that between the coupling and the conduit.

Moreover, the spacing of the ribs *per se* is not an important issue in this case. This is for the reason that the only claim of the patent calls for this feature *in combination* with the right angle feature. That portion of the claim that defines the spacing of the ribs is, therefore, merely one limitation of the claim. The appellant is now estopped to assert this feature by itself, since it accepted the Patent Examiner’s final rejection of the claim specifically directed only toward the spacing of the ribs. Appellant is not now allowed an interpretation of the claim in the patent that would revive the claim which the patentees cancelled in order to get the patent in suit. [R. pp. 176-177.]

Texas Co. v. Anderson-Pritchard Refining Corp.
(C. A. 10, 1951), 122 F. 2d 829, 842;

Tampax, Inc. v. Personal Products Corp. (C. A. 2, 1941), 123 F. 2d 722.

Appellees Use Interrupted Threads.

The appellant has conceded that the prior art discloses interrupted screw threads. The appellees submit that the ribs used on the devices manufactured by appellees are interrupted screw threads, as held by this Honorable Court and the trial court. The physical evidence is believed to prove this. During the actual tests at the trial, the patented coupling was inserted into a conduit, and then disconnected; the ribs of the coupling were scratched on the *sides of the ends*—showing that this is where the ribs contacted the convolutions of the conduit and exerted a longitudinal pressure on the conduit. However, when the coupling of the appellees was inserted into a conduit and then disconnected, the ribs were scratched along the *tops*, showing that the ribs exerted an outward pressure on the conduit and not a longitudinal pressure. Compare Exhibits 3 and 18, respectively. [R. pp. 78, 80.] This outward pressure feature is old in the prior art, as shown by the Hunter patent, No. 1,775,128. [Deft. Ex. C; R. p. 154.]

Expert Testimony.

The argument of the appellant that the ribs used on the couplings manufactured by the appellees are not mutilated screw threads, is believed entirely founded on the testimony of its expert witness. Appellant would have the claim for ribs placed “substantially at right angles” include all interrupted screw threads having a helical angle greater than the helical angle of the conduit.

The patent expert, who was also examined as a mechanical expert, did not realize that any rib placed off of the right angle automatically becomes a thread. Yet this is what happens, because the line of projection of any such

rib around the body of the tubular member, even if the rib is at an angle of only one degree to the right angle, will not return to the point of beginning. The precise meaning of an interrupted thread is that the intermediate thread or threads are omitted. There are also threads known as multiple threads. If this type of thread were to be broken or mutilated or interrupted, the line of projection of one rib would probably never intersect the next succeeding rib. Thus, the ribs used on the accused couplings are mutilated screw threads. As this Court has said, in view of the prior patents showing mutilated screw threads, the appellant cannot now insist that interrupted screw threads are within the scope of the claim of the patent.

Appellant's expert offered no technical evidence to prove his point as to what, in his opinion, constitute screw threads. Appellees brought out the fact that the physical evidence proved, because of the scratch marks, how the appellees' couplings functioned differently than appellant's when connected with a conduit. The appellant's expert "didn't have time" to do this. [R. p. 100.] Therefore, his opinions that the modes of operation of the two couplings are identical must be disregarded. It is inconsistent with what actually happens in operation or use of the two couplings. See *Solomon v. Renstrom* (C. A. 8, 1945), 150 F. 2d 805, 808, as follows:

"The credibility of all witnesses, including experts, and the weight to be given their testimony, is to be determined by the trier of facts, and the court is not bound to accept the opinion of experts as more than advisory, even though such testimony may be undisputed. In the instant case, the trial court specifically held that it must necessarily reject the testimony of these experts because, 'I am unable to

find in their testimony anything that persuades me to follow their contention.' *The interpretation of the claims of a patent is not to be determined by the opinion of experts, but is a question of law for the court.* Gasifier Mfg. Co. v. General Motors Corp., 8 Cir., 138 F. 2d 197 [59 U. S. P. Q. 259]; American Insurance Co. v. Scheufler, 8 Cir., 129 F. 2d 143; Singer Mfg. Co. v. Cramer, 192 U. S. 265; Sanitary Refrigerator Co. v. Winters, 280 U. S. 30 [3 U. S. P. Q. 40]." (Emphasis added.)

File Wrapper Estoppel.

Angelus Sanitary Can Machine Co. v. Wilson (C. A. 9, 1925), 7 F. 2d 314, is not in point. In that case, this Court held that the patent in suit was entitled to a ". . . fairly liberal range of equivalents." In the case at bar, the degree of invention is slight and the range of equivalents is narrow. Under no interpretation can the accused device be considered as equivalent to the claim. (See App. Br. pp. 4-10.) If the claim in suit were interpreted broadly enough to cover appellee's mutilated threads, it would be invalid in view of the prior patents which admittedly show mutilated threads.

On making reference to the *Angelus Sanitary Can* case, *supra*, it will be seen that this Court applied the rule concerning the doctrine of estoppel as that rule was stated by Judge Sanborn in the case of *National Hollow Brake Beam Co. v. The Interchangeable Brake Beam Co.*, 106 Fed. 693. This Court quoted the rule, as it was given by Judge Sanborn, as follows:

"The description in a specification or drawing of details which are not, and are not claimed as, essential elements of a combination, is the mere pointing out of the better method of using the invention.

* * * A reference in a claim to a letter or figure used in a drawing and in the specification to describe a device or an element of a combination does not limit the claim to the specific form of that element there shown, *unless that particular form was essential to, or embodied the principle of, the improvement claimed.*" (Emphasis added.)

Thus it is seen that the rule, as it is defined, is very different from the way appellant urges that it now be applied. Furthermore, it is obvious that the rule should not be applied in the instant case in the same way that it was applied in the *Angelus Sanitary Can* case, for the instant case is covered by the exception to the rule, which has been italicized in the above quoted passage. The file wrapper makes it abundantly clear that the right angular arrangement of the rib claimed by the patentees is essential to their invention, and embodies the principle of the improvement claimed.

The appellant has attempted to distinguish the *Tampax* case, *supra*, which this Court applied in its opinion. (*Tampax, Inc. v. Personal Products Corp.* (C. A. 2, 1941), 123 F. 2d 722.) The implication of appellant's argument appears to be that this Court should not look to the file wrapper to see what is meant by "substantially." This argument is believed to be contrary to the well-established rule followed not only in this Circuit but also in other Circuits in this country, of looking to the file wrapper to determine the meaning of a word. Therefore, it is believed that this Court was correct that the *Tampax* case is "peculiarly applicable" to the instant case. See the *Schnitzer* case, quoted below.

The appellant has quoted a passage from the case of *Hoe and Co. v. Goss Printing Press Co.*, 30 F. 2d 271

C. A. 2). It implies that the rule in regard to file wrapper estoppel is different in that Circuit than it is in this Circuit. However, this argument is not believed to be valid either, as will be seen from the following quotation taken from the case of *Schnitzer v. The California Corrugated Culvert Co.* (C. A. 9, 1944), 140 F. 2d 275, 276:

“The claim is to be read in connection with the specifications. [Citing cases.] Where the claim uses broader language than the specifications, reference may be had to the latter for the purpose of limiting the claim. *McClain v. Ortmyer*, 141 U. S. 419, 12 S. Ct. 76, 35 L. Ed. 800; *Magnavox Co. v. Hart & Reno*, 9 Cir., 73 F. 2d 433; *Lanyon v. M. H. Detrick Co.*, 9 Cir., 85 F. 2d 875. The file wrapper contains evidence that the inventor understood this element of his claim in the narrower sense. * * * While it is the rule in this circuit that admissions made by the applicant to the examiner are not to be used to narrow the scope of his claim unless he has made changes in his application pursuant to the examiner’s suggestions *yet the proceedings may be used to aid in construing the claim.* *Warren Bros. Co. v. Thompson*, 9 Cir., 293 F. 745.” (Emphasis added.)

The *Schnitzer* case was, of course, cited by the trial court in the present case, and, in fact, regarded by the trial court as controlling. The appellees believe that that case is also “peculiarly applicable” to the present case. The trial court, by its application of the *Schnitzer* case, decided that the claim of the patent in suit was not broad enough to read on the coupling manufactured by the appellees. This was for the reason that these appellees’ coupling had both a different means (the ribs placed at an angle to the right angle) and a different mode of

operation (the outward expansion rather than elongation of the conduit). Consequently, it was the opinion of the trial court that the accused couplings did not infringe the limited claim of the patent in suit. This finding of the trial court, concurred in by this Honorable Court, is not clearly erroneous, and the appellant has not shown it to be clearly erroneous.

Re Samples.

In regard to the few samples the appellees passed out to certain customers, the trial court noted that this was done several years ago, and has not been done since. Furthermore, no sale or use was ever made of them. The Court then noted that this was an equity case, and it did not see any reason for issuing an injunction against the appellees at this late date for an act done several years ago. This was particularly true since there was no likelihood of a resumption thereof. This decision by the trial court was not clearly erroneous.

The case the appellant cited in this respect, *Carter Crume Co. v. American Sales Book Co.* (N. Y., 1903), 124 Fed. 903, can be easily distinguished. In that case the defendant not only manufactured samples of the patented device, *but also threatened to sell such devices.* Therefore, an injunction was granted against the defendant because the equities were against him. As indicated above, this situation does not prevail in the present case, and, therefore, the *Carter Crume* case is not applicable.

Conclusion.

It is the opinion of the appellees that the petition for the rehearing which has been brought by the appellant is based solely upon appellant's contention that both the trial court and this Honorable Court were in error in holding that appellees' angular ribs were merely mutilated screw threads. The appellees believe that both the trial court and this Honorable Court were correct in recognizing that the ribs placed on the accused devices are mutilated screw threads, because (1) the markings showed that appellees' couplings, when screwed in place, followed the contour of the threads within the conduit, and (2) since the appellees' threads are at an angle, a projection of any one of appellees' ribs would never return to the same rib, showing that appellees' ribs are segments of spiral screw threads.

It is, therefore, respectfully submitted that appellant's petition for a rehearing should be denied.

Respectfully submitted,

C. G. STRATTON,

LOUIS M. WELSH,

Attorneys for Appellees.



No. 14400

United States
Court of Appeals
for the Ninth Circuit

UNITED PRODUCERS AND CONSUMERS
CO-OPERATIVE, a Corporation, and
SOUTHWEST CO-OPERATIVE WHOLE-
SALE, a Corporation,

Appellants,

vs.

RALPH W. HELD,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

AUG 31 1954

PAUL P. O'BRIEN

No. 14400

United States
Court of Appeals
for the Ninth Circuit

UNITED PRODUCERS AND CONSUMERS
CO-OPERATIVE, a Corporation, and
SOUTHWEST CO-OPERATIVE WHOLE-
SALE, a Corporation,

Appellants,

vs.

RALPH W. HELD,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	7
Appeal:	
Clerk's Certificate of Record on.....	355
Notice of	47
Order Extending Time for Filing Record on	52
Statement of Points on.....	358
Attorneys of Record.....	1
Clerk's Certificate of Record on Appeal.....	355
Complaint	3
Ex. A—Manager's Agreement.....	5
Findings of Fact, Conclusions of Law and Judgment	27
Findings of Fact, Conclusions of Law and Judgment, Proposed	16
Motion for New Trial, Motion to Amend Find- ings and Motion to Amend Judgment.....	33
Notice of Appeal.....	47
Order Denying Motion for New Trial, Amend- ing Findings of Fact in Part and Amending Judgment in Part.....	45

INDEX	PAGE
Order Extending Time for Filing Record on Appeal	52
Order for Judgment for the Plaintiff.....	15
Order Modifying Judgment.....	43
Proposed Amendments and Additions to Plaintiff's Proposed Findings.....	21
Statement of Points on Which Appellants Intend to Rely.....	358
Stipulation Allowing Exhibits to Be Considered in Their Original Form.....	364
Stipulation and Order of Substitution of Attorneys, Filed March 23, 1954.....	44
Stipulation and Order of Substitution of Attorneys, Filed June 17, 1954.....	53
Supersedeas Bond	48
Transcript of Proceedings.....	54
Witnesses, Defendant's:	
Ashby, Ralph	
—direct	228
—cross	231
—redirect	232
—recross	232
Barber, Everett	
—direct	247
—cross	249
—redirect	251

INDEX

PAGE

Witnesses, Defendant's—(Continued):

Collier, I. F.

—direct	211
—cross	216
—redirect	221

Essley, D. O.

—direct	198, 203
—cross	207
—redirect	210
—recross	211

Holmes, Herbert F.

—direct	295
—cross	300
—redirect	303
—recross	304

Hunt, Paul

—direct	233
—cross	235

Huron, Joe

—direct	238
—cross	244

Kleinz, John N.

—direct	311
—cross	313

Witnesses, Defendant's—(Continued) :

McInerney, Pauline

—direct	281, 316
—cross	329
—redirect	334, 336
—recross	335

Palmer, Lehi B.

—direct	305
—cross	307
—redirect	309

Purdy, Harry

—direct	251
—cross	253
—redirect	255
—recross	256

Rovey, Emil

—direct	222
—cross	226

Schoen, Wanda

—direct	256
—cross	258

Sims, Harvey

—direct	272
—cross	274
—redirect	275

Stoltzfus, Ivan

—direct	276
—cross	279

INDEX

PAGE

Tway, Irvin D.

—direct 314

Witnesses, Plaintiff's:

Blake, John W.

—direct 345

—cross 348

Held, Ralph W.

—direct 56, 99, 349

—cross 100, 353

—redirect 136, 139

—recross 138

Knox, Orville

—direct 140

—cross 154

—redirect 156, 164

—recross 157

Leonard, James

—direct 337

—cross 342

Wahmsley, Lewis G.

—direct 192

—cross 166

—redirect 259, 268, 271

—recross 264, 269

ATTORNEYS OF RECORD

SCOVILLE AND LINTON,
219 Heard Building,
Phoenix, Arizona,

Attorneys for Appellants.

JENNINGS, STROUSS, SALMON & TRASK,
Title and Trust Building,
Phoenix, Arizona,

Attorneys for Appellee.

In the United States District Court for the
District of Arizona
No. Civ.-1798 Phx.

RALPH W. HELD,

Plaintiff,

vs.

UNITED PRODUCERS AND CONSUMERS CO-
OPERATIVE, a Corporation, and SOUTH-
WEST CO-OPERATIVE WHOLESALE, a
Corporation,

Defendants.

COMPLAINT

Comes Now the plaintiff, Ralph W. Held, and
for his complaint against the defendants, alleges:

I.

The Plaintiff, Ralph W. Held, is a citizen of the
State of Iowa. The defendant United Producers
and Consumers Co-Operative is a corporation incor-
porated under the laws of the State of Arizona,
and the defendant Southwest Co-Operative Whole-
sale is a corporation incorporated under the laws
of the State of Arizona. The matter in controversy
exceeds, exclusive of interest and costs, the sum of
Three Thousand (\$3,000.00) Dollars.

II.

That on or about the 22nd day of March, 1952,
plaintiff entered into a contract with the defendants
in writing according to the terms of which the de-
fendants agreed to employ the plaintiff as manager
for a term of three (3) years beginning on the 1st

day of April, 1952, a copy of which contract is attached hereto marked "Exhibit A," and by this reference made a part hereof.

III.

That on or about the 1st day of April, 1952, pursuant to the terms of said contract of employment, the plaintiff entered upon the service of the defendants under said contract and has ever since been ready, willing and able to perform all of the obligations on his part to be performed as provided in said contract.

IV.

That on or about the 20th day of June, 1952, the defendants and each of them, wrongfully discharged the plaintiff and cancelled the contract and notified the plaintiff that his services were terminated.

V.

That as a result of the wrongful termination of said contract, the plaintiff has been damaged in the sum of Twenty-five Thousand, Four Hundred Ten and 50/100 (\$25,410.50) Dollars.

Wherefore, plaintiff prays judgment against the defendants and each of them, in the sum of Twenty-five Thousand, Four Hundred Ten and 50/100 (\$25,410.50) Dollars, together with his costs herein incurred and expended.

JENNINGS, STROUSS,
SALMON & TRASK,

By /s/ O. M. TRASK,
Attorneys for Plaintiff.

EXHIBIT A

Manager's Agreement

This Agreement, made and entered into by and between Ralph W. Held, hereinafter called Manager, and Southwest Co-Operative Wholesale and/or United Producers and Consumers Co-Operative hereinafter called Company, Witnesseth:

In consideration of the mutual obligation of the parties hereto, It Is Agreed as Follows:

1. That Company hereby employs Manager in the capacity of General Manager of its business for a period of three years beginning April 1st, 1952, and Manager agrees to give his exclusive time to the management and promotion of the affairs of the company.

2. That Manager shall have the right to employ and discharge all persons needed to carry on the affairs of the business; shall supervise all personnel under independent contract with Company for the distribution of its products in accordance with the provisions of such contract with such person, and shall immediately report to the executive officers of the Board of Directors any misconduct or failure of duty of Company's employees, or of any salesman.

3. That Manager shall furnish a corporate surety bond to Company indemnifying Company against loss of any moneys, merchandise, or any properties, occasioned by his default of duty, such bond to be in an amount designated by the Board of Directors

of Company. The premium for such corporate surety bond shall be paid by Company.

4. As fixed compensation for Manager's services hereunder, Company agrees to pay the Manager as fixed compensation for first year's period a salary of \$10,000.00.

It is understood and agreed that Manager's moving expense from Des Moines, Iowa, to Phoenix, Arizona, shall be paid by the Company, but expense shall in no event exceed \$500.00.

Compensation for the second and third years of this three year agreement shall be at the rate of \$10,000.00 per annum plus two (2) per cent of the net income of Company.

It is further understood and agree that at the expiration of this three-year agreement, it may be renewed for another three-year period by the mutual consent of the parties hereto at the same rate as specified for the final two years of this agreement.

It Witness Whereof the parties have placed their hands to duplicates hereof this 22nd day of March, A.D. 1952.

Company:

SOUTHWEST CO-OPERATIVE WHOLESALE
and/or UNITED PRODUCERS & CONSUMERS
CO-OPERATIVE,

By /s/ W.L. SMITH,
President.

Manager:

/s/ RALPH W. HELD.

[Endorsed]: Filed October 10, 1952.

[Title of District Court and Cause.]

ANSWER

The defendants in the above-entitled cause for their answer to the plaintiff's complaint therein, admit, deny and allege as follows:

I.

They admit the allegations of paragraph numbered I of said complaint.

II.

Answering paragraph II of said complaint, the defendants deny that they ever entered into the contract in writing therein described and referred to and deny the execution by the defendants, or either of them, or by the authority of either of them, of the so-called "Manager's Agreement," a copy of which is attached to said complaint as Exhibit A. In this behalf the defendants admit that, under the circumstances hereinafter set forth, one W. L. Smith who was then president of the Board of Directors of each of the defendants, signed his name to said "Manager's Agreement," and that thereafter, to wit, on or about March 22, 1952, the plaintiff signed the same; but the defendants allege that said purported agreement is, and at the time of the attempted making thereof was, unauthorized, illegal, contrary to public policy, and void, because of the following facts, which the defendants allege to be the facts, to wit:

(a) That the Articles of Incorporation, together

with the bylaws of each of the defendants, provide, as the plaintiff at the time when he attempted to make said contract well knew, that the affairs of the corporation were to be conducted by a board of directors and that the board of directors had the power to appoint and remove at pleasure all officers, agents and employees of the company, and to appoint a manager who was to hold office at the pleasure of said board; but in violation of said provisions said manager's agreement purports to employ the plaintiff for the full period of at least three years, beginning April 1, 1952, and to give him the right and authority to employ and discharge all persons needed to carry on the business of the defendants.

(b) That at the time of the attempted making of said manager's agreement, the board of directors of the defendant United Producers and Consumers Co-Operative consisted of seven members, each of whom was holding office for a three-year term, and the terms of office of three of them were to expire in October, 1952, the terms of office of two of them were to expire in October, 1953, and the terms of office of the remaining two were to expire in October, 1954, and the board of directors of the defendant Southwest Co-Operative Wholesale consisted of ten members, each of whom was holding office for a three-year term, and the terms of office of three of them were to expire in October, 1952; the terms of office of another three of them were to expire in October, 1953, and the terms of office of

the remaining four of them were to expire in October, 1954; so that the said purported manager's agreement attempted to turn over to the exclusive control of the plaintiff the operation and management of each of the defendants for periods long after the expiration of the terms of office of the directors then in office.

(c) That no action was ever taken by the board of directors of either of the defendants in relation to employment of the plaintiff as manager, other than the adoption of a resolution by the board of directors of each defendant on March 6, 1952, reading as follows: "that Mr. Smith and Mr. Walmsley be authorized to employ Mr. Held as general manager and work out terms of employment," the Mr. Smith referred to in said resolution being Mr. W. L. Smith, then president of each defendant, the Mr. Walmsley therein referred to being Mr. Lewis G. Walmsley, the auditor of the defendants, and the Mr. Held therein referred to being the plaintiff Ralph W. Held; but notwithstanding the premises the said purported manager's agreement was never submitted to or approved by the defendants' said auditor, nor was said auditor ever consulted concerning, nor did he ever agree to, the provisions of said agreement attempting to give the plaintiff power to employ and discharge all persons needed to carry on the affairs of the business, or attempting to give the plaintiff such entire charge of the defendants' affairs for the full period of at least three years regardless of his ability, or efficiency, or

whether his services should meet with the approval of the board of directors of the respective defendants. In this behalf the defendants allege that said form of manager's agreement had been prepared by the plaintiff, and on March 6, 1952, was presented to the defendants' said president, W. L. Smith, who signed the same without presenting it to said auditor or getting his assistance in working out its terms, with the understanding between the plaintiff and said W. L. Smith that the plaintiff would take both copies of said form of agreement back to his home in the State of Iowa and would thereafter, within fifteen days, execute the same and return it to said Smith, if the plaintiff decided that he would accept the contemplated employment. The defendants allege on information and belief that it was the intention and understanding of said W. L. Smith, at the time when he so signed and placed in the possession of the plaintiff said form of agreement, that in the event the plaintiff should thereafter sign and return a copy thereof, then he would consult with the defendants' said auditor and determine whether the terms of said manager's agreement were satisfactory and valid. The defendants allege, however, that their said president, W. L. Smith, died on the morning of March 25, 1952, and that said manager's agreement signed by the plaintiff did not come to him during his lifetime, but came by mail to his residence on March 25, 1952, after the hour of his death, and never has been approved by the defendants'

said auditor or by either of their boards of directors.

III.

Answering paragraph III of said complaint, the defendants admit that on or about the first day of April, 1952, the plaintiff entered upon the service of the defendant in claimed compliance with the aforesaid purported manager's agreement but deny that he was ever ready, willing or able to perform the services called for in said contract.

IV.

Answering paragraph IV of said complaint, the defendants admit that on or about the 20th day of June, 1952, they, in their resolution hereinafter mentioned, declared the purported employment of the plaintiff at an end, but deny that at any time they wrongfully discharged the plaintiff or wrongfully cancelled his contract. In this behalf the defendants allege that upon the death of said president, W. L. Smith, one D. O. Essley was elected as president of each defendant, and that upon said new president discovering the terms of said so-called manager's agreement, he notified the plaintiff, on or about May 27, 1952, that the legality of the plaintiff's employment was questioned, and thereupon, after discussions and negotiations between members of said board of directors and the plaintiff, the boards of directors of the defendants each duly adopted and transmitted to the plaintiff the aforementioned resolution, which resolution stated that in view of the fact that the board mem-

bers were of the opinion that the plaintiff was never legally employed and the illegality of his employment only recently had been discovered by the board of directors, and in view of the fact that the plaintiff had never fulfilled the terms of his contract, therefore, his purported employment by the defendants was declared at an end.

V.

Answering paragraph numbered V of the complaint, the defendants deny that as a result of their termination of the plaintiff's claimed contract of employment, or by any wrongful act or conduct on the part of the defendants, or either of them, the plaintiff has been damaged in the sum of \$25,410.50 or in any other sum whatsoever.

VI.

Further answering the plaintiff's complaint, the defendants allege that, even if it should be determined that the so-called manager's agreement sued upon was, or ever became, a valid agreement between the parties thereto, even so, the plaintiff, during the period of his pretended performance of his part of said contract, so far breached and failed to live up to said contract as to justify the defendants in declaring said purported contract to be terminated. In this behalf the defendants allege the facts to be as follows:

That during the time when the plaintiff was assuming and purporting to act as manager of the defendant he did not have nor exercise the capacity

or ability to properly serve as such manager; he did not have nor exercise the capacity or ability to lead or direct the employees of the defendants or recognize or utilize the ability of such employees to render efficient services; he did not remain on the job at his office or at the defendants' place of business a sufficient length of time each day to properly manage or direct the business or employees of the defendants; that although there were some twelve department heads and about 125 other employees in the service of the defendants, the plaintiff did not confer with them or direct them or hold needed meetings of department heads or staff members or other employees; that contrary to the express terms of said claimed manager's agreement, the plaintiff violated his duty immediately to report to the executive officers of the boards of directors of the defendants certain misconduct and failure of duty on the part of a sales manager of the defendants, upon such misconduct coming to the attention of the plaintiff, which misconduct and failure of duty consisted of said sales manager wrongfully seeking and endeavoring to exact from a number of salesmen working under him a percentage of their commissions; and that by the plaintiff's aforesaid breaches of his claimed contract and failure to properly perform the duties of a general manager, he was greatly injuring the morale of a large number of faithful employees of the defendants, and continuance of the regime he had assumed as manager would have been highly injurious to the business of the defendants.

The defendants further allege that during the entire time when the plaintiff was so assuming to act as manager of the defendants, he drew from the defendants and caused them to pay him, for his claimed services, the total sum of \$2,275.64; and that the defendants have fully paid, and in fact overpaid, the plaintiff for any and all services rendered them, or either of them, by him.

Wherefore, the defendants pray the judgment of the court that the plaintiff take nothing by his complaint and that the defendants have their taxable costs herein incurred.

LANEY & LANEY,

By /s/ LYNN M. LANEY,

Attorneys for Defendants.

State of Arizona,
County of Maricopa—ss.

D. O. Essley, being first duly sworn, on his oath deposes and says:

That he is the President of the Board of Directors of both the defendant United Producers & Consumers Co-Operative and the Southwest Co-Operative Wholesale, and makes this affidavit for and on behalf of said two corporations; that this affiant has read the plaintiff's complaint in the above-entitled cause and the defendants' foregoing answer and knows the contents of said documents: that the allegations of the plaintiff's complaint

which are in the foregoing answer denied are untrue, except as to such thereof as are denied on information and belief, and that as to those, this affiant believes them to be untrue; and that the allegations of the foregoing answer are true of this affiant's own knowledge, except as to such thereof as are made on information and belief, and that as to those, he believes them to be true.

/s/ D. O. ESSLEY.

Subscribed and sworn to before me this 3rd day of November, 1952.

[Seal] /s/ LEORA SCHUCK,
Notary Public.

My commission expires Jan. 2, 1955.

Affidavit of mailing attached.

[Endorsed]: Filed November 4, 1952.

[Title of District Court and Cause.]

ORDER

It Is Ordered that judgment be entered in favor of the plaintiff, and against the defendants, in the sum of \$22,246.68.

Dated: August 25, 1953.

/s/ DAVE W. LING,
United States District Judge.

[Endorsed]: Filed August 26, 1953.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled action came on regularly for trial before the Court without a jury, the plaintiff appearing in person and by his attorney, Mr. O. M. Trask, of the firm of Jennings, Strouss, Salmon & Trask, and the defendants appearing by their duly authorized agents, and by their attorney, Mr. Lynn M. Laney, of the firm of Laney & Laney, and testimony having been offered and briefs filed by both parties, the Court, having been fully advised in the premises, now makes and files its findings of fact as follows:

Findings of Fact

I.

That the plaintiff, Ralph W. Held, is a citizen of the State of Iowa and defendants, United Producers and Consumers Co-Operative and Southwest Co-Operative Wholesale, are both corporations organized and incorporated under the laws of the State of Arizona and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

II.

That on or about March 22, 1952, the plaintiff and defendants entered into a written contract according to the terms of which the defendants agreed to employ the plaintiff as manager for a period of three (3) years beginning on the 1st day

of April, 1952, at an annual salary of Ten Thousand (\$10,000.00) Dollars per year, plus two (2%) per cent of the net income of the corporations for the second and third years of the agreement.

III.

That said contract was executed on behalf of the defendants by W. L. Smith, President of each of the defendants, who had been expressly empowered by the Boards of Directors of each of the defendant corporations to negotiate and enter into said contract on behalf of the said defendant corporations.

IV.

That the term of the contract was a reasonable term in view of the terms of office of the several boards of directors and the established practice of continuing said directors in office; that the bylaws of each of the defendant corporations provided for the amendment of said bylaws by the Boards of Directors of the defendant corporations; and that the action of the respective Boards of Directors in entering into the contract amounted to an amendment of said bylaws in any respect necessary to enable each of said corporations to enter into said contract.

V.

Under the evidence the approval of Lewis G. Walmsley was not required to authorize or validate said contract but both Walmsley and the Boards of Directors of the two corporations at all times knew, or were charged with knowledge, of the existence

of said contract and failed to object to the terms of said contract or disapprove it. The plaintiff, Ralph W. Held, was not notified formally or charged with knowledge of any requirement, even if it existed, that Lewis G. Walmsley was supposed to approve the terms of said contract.

VI.

At all times W. L. Smith, President of each of the defendant corporations, had been clothed with the apparent authority by the Boards of Directors of the two defendant corporations to negotiate and execute the contract with the plaintiff. The said President, W. L. Smith, at all times during the negotiation of the contract and at the time of its execution by both parties, had implied authority to bind each of the defendant corporations to the terms of said contract.

VII.

That on or about April 1, 1952, the plaintiff entered upon the performance of his duties as manager pursuant to the terms of the contract, and at all times thereafter complied with all of the terms thereof up to and including the date upon which the contract was terminated by the action of the two defendant corporations; that the action of the plaintiff in entering upon his duties and in performance of said duties as required by the contract was at all times with the full knowledge of the two corporations and the members of the Boards of Directors of the said corporations.

VIII.

That on or about June 20, 1952, the defendant corporations and each of them, discharged the plaintiff and cancelled his contract and notified the plaintiff that his services were terminated; that said action on the part of each of the defendant corporations was wrongful and without justification.

IX.

That the plaintiff sustained damages proximately resulting from the termination of said contract in the total sum of Twenty-two Thousand Two Hundred Forty-six and 68/100 (\$22,246.68) Dollars.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ON BEHALF OF THE PLAINTIFF

Conclusions of Law

From the foregoing findings the Court concludes:

I.

That the contract between plaintiff and the defendants dated March 22, 1952, was a legally valid and enforceable contract.

II.

That the plaintiff at all times prior to the wrongful termination of said contract satisfactorily performed the terms thereof.

III.

That said contract was terminated by the defendants wrongfully and without justification on or about June 20, 1952, which termination constituted an actionable breach of the contract by said defendants.

IV.

That the plaintiff is entitled to recover from the defendants for the breach of said contract the sum of Twenty-two Thousand Two Hundred Forty-six and 68/100 (\$22,246.68) Dollars.

JUDGMENT

Wherefore, It Is Ordered by the Court that the plaintiff recover judgment against the defendants, and each of them, in the sum of Twenty-two Thousand Two Hundred Forty-six and 68/100 (\$22,246.68) Dollars, together with plaintiff's costs in the sum of One Hundred Seventy-two and 78/100 (\$172.78) Dollars.

Dated this day of September, 1953.

.....,

United States District Judge.

Received September 4, 1953.

[Endorsed]: Filed September 4, 1953.

[Title of District Court and Cause.]

PROPOSED AMENDMENTS AND ADDITIONS
TO PLAINTIFF'S PROPOSED FINDINGS

Pursuant to Rule 21 of the Rules of Practice of the United States District Court for the District of Arizona, the defendants respectfully propose the following amendments and additions to the proposed Findings of Fact, Conclusions of Law and Judgment in the above-entitled cause, which were served on counsel for the defendants on September 4, 1953, to wit:

1. The defendants propose an amendment of Finding of Fact No. II by inserting after the words "defendants entered into," where they occur in the second line of said paragraph, the following: ", in the manner hereinafter set out,"; and by adding at the end of said paragraph the following: ", the said written contract being in words and figures as set out in Exhibit "A" attached to the plaintiff's complaint."

2. The defendants propose that Paragraph III of said Findings be amended so as to read as follows:

That said contract was executed on behalf of the defendants by W. L. Smith, president of each of the defendants, who together with the defendants' auditor, Lewis G. Walmsley, had been expressly authorized to employ the plaintiff by a resolution of each board of directors, worded as follows:

“Be It Resolved that Mr. Smith and Mr. Walmsley be authorized to employ Mr. Held as general manager and work out terms of employment.”

That said auditor Walmsley did not sign said contract of employment or agree thereto, or work out or help to formulate the terms of employment therein contained.

3. That Paragraph IV of said Findings be amended by adding thereto the following further findings, to wit:

That the provision of the bylaws of the United Producers & Consumer Co-Operative relative to amendment (Article XIV) at the time of making the contract, was as follows:

“These bylaws may be altered or amended at any annual or special meeting of the members called for that purpose. The written assent of a majority of the members shall be effectual to repeal or amend any bylaws or to adopt additional bylaws without any meeting. The bylaws may be amended, altered or repealed by the board of directors at any regular or special meeting.”

That the provision of the bylaws of the defendant Southwest Co-Operative Wholesale concerning amendment (Article VII) was as follows:

“These bylaws may be amended by the ma-

jority vote of the directors of the corporation at any meeting called for that purpose, except as limited in the Articles of Incorporation or by law.”

That the bylaws of United Producers and Consumers Co-Operative contained the following provisions in Article V under the heading “Powers of Directors”:

* * *

“Section 2. To appoint and remove, at pleasure, all officers, agents and employees of the Co-Operative, prescribe their duties, fix their compensation and require from them, if advisable, security for faithful service.

* * *

“Section 8. The Board of Directors may, in its discretion, appoint a manager who shall hold office at the pleasure of and upon terms and conditions fixed by the Board of Directors.”

That the bylaws of the Southwest Co-Operative Wholesale contained the following provisions:

“The Board of Directors shall have the following powers:

“2. To appoint and remove at pleasure all officers, agents and employees of the corporation, prescribing their duties, fixing their compensation and requiring from them, if deemed advisable, security for faithful service.

“3. To appoint a manager who shall hold office at the pleasure and upon the terms and conditions fixed by the Board of Directors who shall exercise such powers and perform such duties as the Board of Directors shall delegate and prescribe.”

That at the time of the signing of said manager's agreement, the board of directors of United Producers & Consumers Co-Operative consisted of seven members, each holding office for a three-year term, with the terms of office of three of them to expire in October, 1952, the terms of office of two of them to expire in October, 1953, and the terms of office of the remaining two to expire in October, 1954; and the board of directors of Southwest Co-Operative Wholesale consisted of ten members, each holding office for a three-year term, with the terms of office of three of them to expire in October, 1952, the terms of office of another three of them to expire in October, 1953, and the terms of office of the remaining four to expire in October, 1954.

4. That the first sentence of Paragraph V of said Findings, being the first five and one-half lines thereof, be stricken out because not supported by the evidence; and that the last sentence of said paragraph be amended so as to read as follows:

The plaintiff Ralph W. Held was not notified formally of any requirement, if it existed, that Lewis G. Walmsley was supposed to approve the terms of said contract, but that the plaintiff was

present when the president of the defendants handed the aforementioned resolution for the employment of the plaintiff to the assistant secretary of the defendants, Pauline McInerney, for recording in the corporate minutes, and he had knowledge that W. L. Smith was acting as agent, and he relied solely on the representations of W. L. Smith as to his authority and made no investigation as to the actual authority of W. L. Smith.

5. The defendants propose that Paragraph VI of said Findings be amended by striking out the first sentence thereof, on the ground that the same is not sustained by the evidence. The defendants further propose that the second sentence of Paragraph VI be stricken out, on the ground that the same is not sustained by the evidence. In this behalf the defendants propose that the court make the following findings of fact, either in lieu of the matter so proposed to be stricken or at any rate at some place in the court's findings of fact, to wit:

That prior to the time when the agreement sued upon was formulated and signed the plaintiff received from defendants copies of the bylaws of the defendant United Producers & Consumers Co-Operative and the bylaws of the Southwest Co-Operative Wholesale, and he was familiar with the terms of said bylaws at the time when said contract was formulated and signed.

6. That the following additions to Paragraph

IX of said Findings be made at the end of said paragraph, to wit:

That the items comprising said total sum of damages as found by the court are as follows:

Fixed wage from defendants for three years	\$30,000.00	
2% of net margin for 2nd year (based on average for years 1951, 1952 & 1953)	6,196.66	
2% of net margin for 3rd year (on same basis)	6,196.66	
	<hr/>	
Total		\$42,393.32
Less amount received from the defendants	\$ 2,275.64	
Less amount received and to be received from present employment:		
First year	4,725.00	
Second year	8,100.00	
Third year	8,100.00	
	<hr/>	
Total		23,200.64
		<hr/>
Contract Damages		\$19,192.68
Special damages:		
Loss deposit on house which plaintiff purchased	\$ 2,100.00	
Expense of travel	454.00	
Moving expense	500.00	
	<hr/>	
	\$ 3,054.00	
		3,054.00
		<hr/>
Total Damages		\$22,246.68

By proposing the foregoing amendments and additions to the plaintiff's proposed findings of fact, the defendants do not intend to waive their right to

object and except, by motion for new trial or for modification of the judgment, to the court's findings and judgment as they may be finally settled herein.

Respectfully submitted,

LANEY & LANEY,

By /s/ LYNN M. LANEY,

Attorneys for Defendants.

Received September 9, 1953.

[Endorsed]: Filed September 9, 1953.

In the United States District Court for the
District of Arizona

No. Civ. 1798 Phx.

RALPH W. HELD,

Plaintiff,

vs.

UNITED PRODUCERS AND CONSUMERS CO-
OPERATIVE, a Corporation; SOUTHWEST
CO-OPERATIVE WHOLESALE, a Corpra-
tion,

Defendants.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

The above-entitled action came on regularly for trial before the Court without a jury, the plaintiff appearing in person and by his attorney, Mr. O. M.

Trask, of the firm of Jennings, Strouss, Salmon & Trask, and the defendants appearing by their duly authorized agents, and by their attorney, Mr. Lynn M. Laney, of the firm of Laney & Laney, and testimony having been offered and briefs filed by both parties, the Court, having been fully advised in the premises, now makes and files its findings of fact as follows:

Findings of Fact

I.

That the plaintiff, Ralph W. Held, is a citizen of the State of Iowa and defendants, United Producers and Consumers Co-Operative and Southwest Co-Operative Wholesale, are both corporations organized and incorporated under the laws of the State of Arizona and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

II.

That on or about March 22, 1952, the plaintiff and defendants entered into, in the manner hereinafter set out, a written contract according to the terms of which the defendants agreed to employ the plaintiff as manager for a period of three (3) years beginning on the 1st day of April, 1952, at an annual salary of Ten Thousand (\$10,000.00) Dollars per year, plus two (2%) per cent of the net income of the corporations for the second and third years of the agreement, the said written contract being in words and figures as set out in Exhibit A attached to Plaintiff's complaint.

III.

That said contract was executed on behalf of the defendants by W. L. Smith, President of each of the defendants, who had been authorized by the Boards of Directors of each of the defendant corporations to negotiate and enter into said contract on behalf of the said defendant corporations.

IV.

That the term of the contract was a reasonable term in view of the terms of office of the several boards of directors and the established practice of continuing said directors in office; that the bylaws of each of the defendant corporations provided for the amendment of said bylaws by the Boards of Directors of the defendant corporations; and that the action of the respective Boards of Directors in entering into the contract amounted to an amendment of said bylaws in any respect necessary to enable each of said corporations to enter into said contract.

That at the time of the signing of said manager's agreement, the board of directors of United Producers & Consumers Co-Operative consisted of seven members, each holding office for a three-year term, with the terms of office of three of them to expire in October, 1952, the terms of office of two of them to expire in October, 1953, and the terms of office of the remaining two to expire in October, 1954; and the board of directors of Southwest Co-Operative Wholesale consisted of ten members, each

holding office for a three-year term, with the terms of office of three of them to expire in October, 1952, the terms of office of another three of them to expire in October, 1953, and the terms of office of the remaining four to expire in October, 1954.

V.

Under the evidence the approval of Lewis G. Walmsley was not required to authorize or validate said contract but both Walmsley and the Boards of Directors of the two corporations at all times knew of the existence of said contract and failed to object to the terms of said contract or disapprove it. The plaintiff, Ralph W. Held, was not notified formally that Lewis G. Walmsley was supposed to approve the terms of said contract.

That prior to the time when the agreement sued upon was formulated and signed the plaintiff received from defendants copies of the bylaws of the defendant United Producers & Consumers Co-Operative Wholesale.

VI.

That on or about April 1, 1952, the plaintiff entered upon the performance of his duties as manager pursuant to the terms of the contract, and at all times thereafter complied with all of the terms thereof up to and including the date upon which the contract was terminated by the action of the two defendant corporations; that the action of the plaintiff in entering upon his duties and in performance of said duties as required by the contract was at all times with the full knowledge of the two cor-

porations and the members of the Boards of Directors of the said corporations.

VII.

That on or about June 20, 1952, the defendant corporations and each of them, discharged the plaintiff and cancelled his contract and notified the plaintiff that his services were terminated; that said action on the part of each of the defendant corporations was wrongful and without justification.

VIII.

That the plaintiff sustained damages proximately resulting from the termination of said contract in the total sum of Twenty-two Thousand Two Hundred Forty-six and 68/100 (\$22,246.68) Dollars.

That the items comprising said total sum of damages as found by the Court are as follows:

Fixed wage from defendants for three years	\$30,000.00	
2% of net margin for 2nd year (based on average for years 1951, 1952 & 1953)	6,196.66	
2% of net margin for 3rd year (on same basis)	6,196.66	
	<hr/>	
Total		\$42,393.32
Less amount received from the defendants	\$ 2,275.64	
Less amount received and to be received from present employment:		
First year	4,725.00	
Second year	8,100.00	
Third year	8,100.00	
	<hr/>	
Total		23,200.64
		<hr/>
Contract Damages		\$19,192.68

Special damages:

Loss deposit on house which plaintiff purchased	\$ 2,100.00	
Expense of travel	454.00	
Moving expense	500.00	
	<hr/>	
	\$ 3,054.00	3,054.00
		<hr/>
Total Damages		\$22,246.68

Conclusions of Law

From the foregoing findings the Court concludes:

I.

That the contract between plaintiff and the defendants dated March 22, 1952, was a legally valid and enforceable contract.

II.

That the plaintiff at all times prior to the wrongful termination of said contract satisfactorily performed the terms thereof.

III.

That said contract was terminated by the defendants wrongfully and without justification on or about June 20, 1952, which termination constituted an actionable breach of the contract by said defendants.

IV.

That plaintiff is entitled to recover from the defendants for the breach of said contract the sum of Twenty-two Thousand Two Hundred Forty-six and 68/100 (\$22,246.68) Dollars.

Judgment

Wherefore, It is Ordered by the Court that the plaintiff recover judgment against the defendants, and each of them, in the sum of Twenty-two Thousand Two Hundred Forty-six and 68/100 (\$22,246.68) Dollars, together with plaintiff's costs in the sum of One Hundred Seventy-two and 78/100 (\$172.78) Dollars.

Dated this 6th day of October, 1953.

/s/ DAVE W. LING,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed October 6, 1953.

[Title of District Court and Cause.]

DEFENDANTS' MOTION FOR NEW TRIAL,
MOTION TO AMEND FINDINGS AND MO-
TION TO AMEND JUDGMENT

Motion for New Trial

The defendants move that the judgment entered herein be vacated and set aside and that a new trial be granted on the following grounds:

(1) That the judgment is contrary to law and not supported by the weight of the evidence or the evidence at all.

(2) That the court erred in finding as a fact

that the making of the manager's agreement sued upon, by W. L. Smith, president of each of the defendants, had been authorized by the boards of directors of the defendants, because said finding is not supported by the evidence.

(3) That the court erred in making its findings of fact to the effect that the term of the contract was reasonable though extending beyond the terms of office of the directors, because of the practice in the past of re-electing the directors, and to the effect that the conduct of the boards of directors amounted to an amendment of the bylaws in such manner as to permit the corporations to enter into the contract, because such findings are not supported by the evidence.

(4) That the court erred in finding as a fact that the approval of Lewis G. Walmsley, auditor of each defendant, was not required to authorize or validate the contract, and in finding that said Walmsley and the boards of directors "at all times knew of the existence of said contract and failed to object to the terms of said contract or disapprove of it," because such findings are not supported by the evidence.

(5) That the court erred in its finding that the action of each defendant corporation in discharging the plaintiff and cancelling his claimed contract was wrongful and without justification, because such finding is not supported by the evidence, in that there never was any validly authorized contract.

(6) That the court erred in finding as facts that the plaintiff was entitled, as items of damage, to \$6,196.66 as and for 2 per cent of the net margin for the second year of the term of the contract, to \$6,196.66 as and for 2 per cent of the net margin for the third year, to \$2,100.00 for loss of deposit on house which plaintiff purchased, and to \$545.00 for "expense of travel," on the ground that each and all of said findings are contrary to law and not supported by the evidence.

Motion to Amend Findings

In keeping with certain of the above-stated grounds for defendants' Motion for New Trial, the defendants move the court that the findings of fact made by the court be amended so as to eliminate therefrom the findings of fact alleged to be unsupported by the evidence in paragraphs 2, 3, 4, 5 and 6 of said Motion for New Trial.

The grounds of this motion are that said findings are contrary to and not supported by the evidence.

Motion to Amend Judgment

In the event the court shall deny the foregoing Motion for New Trial, then, without waiving the same, the defendants respectfully move that the court alter or amend the judgment heretofore entered in the following respects:

1. By eliminating therefrom and subtracting from the \$22,246.68 judgment the item of \$6,196.66 included as 2 per cent of the "net margin" for the

second year, and the item of \$6,196.66 included as 2 per cent of the "net margin" for the third year, of the term of the manager's agreement, and substituting in lieu thereof an amount equal to 2 per cent of the "net income" of the defendants for those years, as shown by the evidence, which amount, according to the evidence, would be at most \$435.21 for the second year and \$435.21 for the third year.

The grounds for this subdivision of the present motion are that the manager's agreement sued upon calls for the payment to the plaintiff of \$10,000.00 per annum "plus two (2) per cent of the net income" of the defendants, whereas the two (2) per cent of the "net margin" allowed by the court was contrary to and entirely different from the express terms of the contract.

2. By eliminating from the judgment, and subtracting from the \$22,246.68 awarded by the court, the further sum of \$2,100.00 which was allowed as and for the loss by the plaintiff of the deposit made on the house he purchased.

The grounds for this subdivision of the present motion are that under the law relative to damages for breach of contract, compensation is recoverable only for those injuries that the defendant had reason to foresee when the contract was made as a probable result of his breach of the contract, and there was no evidence that at the time of making the contract it was contemplated that Held would buy a home on installments, or that if he was wrong-

fully discharged he would fail to resell the house or would permit the down payment to be forfeited.

3. By eliminating from the judgment and subtracting therefrom the further sum of \$454.00 which was allowed as "expense of travel."

The grounds for this subdivision are that, while the agreement provided for payment to Held of \$500.00 for "moving expenses from Des Moines, Iowa, to Phoenix, Arizona," there was no provision for any further expense of travel, or for expense of going back to Iowa; and when he recovers the full compensation provided in his contract, less what he earned elsewhere, then giving him the expense of returning to Iowa (which would have been a part of his normal expense at the end of his term) would be paying him twice for the same thing.

Respectfully submitted,

LANEY & LANEY,

By /s/ LYNN M. LANEY,

Attorneys for Defendants.

Memorandum of Points and Authorities

Re Motion for New Trial

In support of the foregoing motion for new trial the defendants submit the following points and authorities:

I.

The attempted employment on behalf of a corporation of a general manager for a term of three

years, when that term would extend beyond the terms of office of all directors and would be contrary to bylaw provisions that the board of directors has power to appoint and remove all officers and that a manager employed by them shall hold office at the pleasure of the board, does not bind the corporation for the full three years, but leaves the board with authority to discharge the manager when the board so desires.

13 Am. Jur., Corporations, Sec. 886, p. 881.

Edwards v. Keller, Texas Civ. App. 133 SW 2d 823.

Tucson Fed. Sav. & Loan Ass'n v. Aetna Inv. Corp. (Ariz.), 245 P. 2d 423.

Leon Farms Corp. v. Beaman, 240 SW 2d 433.

Hunter v. Sun Mut. Ins. Co., 26 La. Ann. 13.

Rundell v. Farmers Co-Op., etc., Co. (Mich.), 178 NW 21.

Darrah v. Wheeling Ice & Storage Co. (W. Va.) 40 SE 373.

Note: "Bylaw of corporation authorizing removal of officer, agent or employee at any time as affecting contract of employment for a specified period," 145 ALR 312.

II.

The only resolution of the boards of directors shown in the evidence authorized Smith and Walmsley to employ Held and work out the terms of employment. That resolution was specific and unam-

ambiguous in its provision that both those men were to work out the terms of employment and effect the employment, but the evidence is that Smith alone attempted to make the employment and work out the terms thereof.

The law is, we submit, that when such a corporate resolution authorizes two persons to negotiate and make a contract that does not authorize one of them alone to do so, and the attempt of one alone to do so does not result in a valid contract.

2 Am. Jur, Agency, 201, Sec. 249.

2 C. J. Agency, 668, Sec. 218.

Dorsey v. Strand (Wash.), 150 P. 2d 702.

Egner v. State Realty Co. (Minn.), 26 NW 2d 464.

III.

The mere fact that the plaintiff was dealing with Smith, whom he knew to be an agent of the corporation, constituted under the law a danger signal, so that Held was obliged to make proper inquiry as to the extent of the agent's authority, and was bound by the lack of authority on the part of Smith.

13 Am. Jur., Corporations, 872, Sec. 891.

Brutinel v. Nygren (Ariz.), 152 P. 1042.

Lois Grunow Memorial Clinic v. Davis (Ariz.), 66 P. 2d 238.

Litchfield v. Green (Ariz.), 33 P. 2d 290.

Cameron v. Lanier (Ariz.), 108 P. 2d 579.

Re Motion to Amend Findings

In support of this motion the defendants call the court's attention to Rule 59 of the Rules of Civil Procedure and our position that the findings sought to be eliminated are not supported by the evidence.

Re Motion to Amend Judgment

As authority for making such a motion we cite subdivision (e) of Rule 59 of Rules of Civil Procedure.

In support of our motion to eliminate as items of damages the 2 per cent of "net margin" for the second and third year, and to substitute in lieu thereof 2 per cent of the "net income," we call the court's attention to the fact that "net income" and "net margin," as used in the books and records of the defendant corporations and as understood by both the corporation and the plaintiff, were vastly different from each other. The evidence was that what was known as "net margin" was the whole return from the sale of goods, over and above costs and expenses, and that what was known as "net income" was the return over and above costs and expenses from the sale of goods to non-members of the corporations. The undisputed evidence was that the prices at which commodities were sold to members were fixed at such amounts as were considered ample to pay all costs and expenses, with the express agreement evidenced by the corporate minutes that the amount received for goods bought by members, over and above costs and expenses, was the property

of the members and would be returned to them. This "net margin," except the portion thereof arising from purchases by non-members, was not a "net income" of the company, but was the property of the members held in trust for them. While Mr. Held and Mr. Walmsley testified about some preliminary conversations concerning a percentage of the "net margin," still the undisputed facts are that Smith and Held made the contract for a percentage of the "net income," that Held is suing on this contract without claiming mistake or asking to reform it, and that he cannot be heard to welch on its terms and claim two per cent of the larger amount of "net margin," rather than the smaller amount of "net income" which he contracted for. Such net income was the amount, according to the evidence, upon which the United Producers & Consumers Co-Operative paid income tax, and no income tax was paid on the rest of the so-called net margin, because that was not income but merely trust funds held as the property of the members.

In support of our motion to eliminate as an item of damage the \$2,100.00 allowed for "loss of deposit on house which plaintiff purchased," and to eliminate as an item of damage the \$454.00 allowed for "expense of travel," the defendants submit the following proposition of law:

In awarding damages for breach of contract compensation may be given for only those injuries that the defendant at the time of making the contract had reason to foresee as a natural result in the usual course of events of his breach of the contract.

The rule is set out in McCormick on Damages, page 575, with *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 47 L. Ed. 1171, cited in support of it, as follows:

“To the restriction upon consequential damages in contract, imposed by *Hadley v. Baxendale*, which requires a showing that the loss must be reasonably foreseeable when the contract was made, a new restriction has been added by the federal and many state courts, namely: that the circumstances of the contract must show that the defendant expressly or impliedly agreed to be liable for consequential loss of the sort in question.”

Another statement of the rule as set out in *Twachtman v. Connelly*, 106 Fed. 2d 501, is as follows:

“The rule is firmly established that damages which may be recovered for breach of contract are such as may fairly and reasonably be considered as either arising naturally, that is, according to the usual course of things, from the breach of the contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it.”

To the same effect:

Restatement of the Law, Contracts, Vol. 1.
Sec. 330.

Woodbury v. Jones, 44 N.H. 206, (loss through selling house not allowed).

Smith v. Pallay (Oregon), 279 P. 279, (loss through purchase of automobile not allowed).

Central Trust Co. v. Clark, 92 Fed. 293, 34 C.C.A. 354.

Respectfully submitted,

LANEY & LANEY,

By /s/ LYNN M. LANEY,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed October 14, 1953.

[Title of District Court and Cause.]

ORDER

The sum of \$2,100.00 allowed as loss on a house purchased by the plaintiff and the sum of \$454.00 allowed as "expense of travel" are eliminated from the judgment entered herein. In all other respects the judgment will stand without further modification.

Dated: February 24, 1954, at Phoenix, Arizona.

/s/ DAVE W. LING,

Judge.

[Endorsed]: Filed February 24, 1954.

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated that Snell & Wilmer be substituted as attorneys of record for defendants United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, in the above-entitled and numbered cause in place and instead of Laney & Laney.

LANEY & LANEY,

By /s/ LYNN M. LANEY.

JENNINGS, STROUSS,

SALMON AND TRASK,

By /s/ O. M. TRASK.

SNELL & WILMER,

By /s/ WALTER LINTON,

/s/ EDWARD JACOBSON.

Order

Pursuant to the foregoing Stipulation,

It Is Hereby Ordered, Adjudged and Decreed that Snell & Wilmer be substituted for Laney & Laney as attorneys for the defendants United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, in the above-entitled and numbered cause.

Dated this 23rd day of March, 1954.

/s/ DAVE W. LING,

United States District Judge for the District of
Arizona.

[Endorsed]: Filed March 23, 1954.

[Title of District Court and Cause.]

ORDER

Defendants' Motion for New Trial, Motion to
Amend Findings and Motion to Amend Judgment
having been argued November 9-10, 1953, and hav-
ing been submitted November 10, 1953; and

This Court having entered the following Order:

“The sum of \$2,100.00 allowed as loss on a
house purchased by the plaintiff and the sum of
\$454.00 allowed as ‘expense of travel’ are elimi-
nated from the judgment entered herein. In
all other respects the judgment will stand with-
out further modification.

“Dated: February 24, 1954, at Phoenix, Ari-
zona.

“DAVE W. LING,
“Judge.”

on February 24, 1954; and

The foregoing Order having the effect of no Order
on the Motion for New Trial; the effect only by im-
plication of an Order on a portion of the Motion to

Amend Findings, and being only by implication an Order on the Motion to Amend Judgment,

Now, Therefore, Be It and It Is Hereby Ordered as follows:

1. Defendants' Motion for New Trial be denied.

2. Defendants' Motion to Amend Findings be denied except for that portion of the paragraph numbered 6 in the Motion for New Trial (incorporated by reference in the Motion to Amend Findings) which states that the plaintiff was entitled, as items of damage, to “* * * \$2,100.00 for loss of deposit on house which plaintiff purchased, and to \$454.00 for ‘expense of travel’ * * *.” As to the foregoing quoted items, the Court finds the plaintiff is not entitled to recover from the defendants for the same as items of damage or otherwise and instructs that Article VIII of the Findings of Fact be amended in accordance herewith.

3. Defendants' Motion to Amend Judgment be granted in part and denied in part so that plaintiff recover judgment against the defendants and each of them in the sum of Nineteen Thousand Six Hundred Ninety-two Dollars and Sixty-eight Cents (\$19,692.68), together with plaintiff's costs in the sum of One Hundred Seventy-two Dollars and Seventy-eight Cents (\$172.78).

Dated this 23rd day of March, 1954.

/s/ DAVE W. LING,

United States District Judge
for the District of Arizona.

Approved as to Form:

JENNINGS, STROUSS,
SALMON AND TRASK,

By /s/ O. M. TRASK,
Attorneys for Plaintiff.

SNELL & WILMER,
By /s/ WALTER LINTON,
/s/ EDWARD JACOBSON,
Attorneys for Defendants.

[Endorsed]: Filed and docketed March 23, 1954.

Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, defendants in the above-entitled and numbered cause, and each of them, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order entered in the above-entitled and numbered cause on March 23, 1954, in favor of the plaintiff, Ralph W. Held, and against the defendants, United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, insofar as said Order of March 23, 1954, denies defendants' Motion for

New Trial; denies in part defendants' Motion to Amend Findings, and grants judgment to plaintiff and against defendants and each of them in the sum of Nineteen Thousand Six Hundred Ninety-two Dollars and Sixty-eight Cents (\$19,692.68), together with plaintiff's costs in the sum of One Hundred Seventy-two Dollars and Seventy-eight Cents (\$172.78).

Dated this 24th day of March, 1954.

SNELL & WILMER,

By /s/ WALTER LINTON,

/s/ EDWARD JACOBSON,

Attorneys for United Producers and Consumers Co-Operative and Southwest Co-Operative Wholesale, Appellants.

[Endorsed]: Filed March 24, 1954.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents:

That we, United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, as Principals, and Fireman's Fund Indemnity Company, a California corporation being a corporate surety, as Surety, are held and firmly bound unto Ralph W. Held in the sum of Twenty Thousand Dollars (\$20,000.00),

to be paid to the said Ralph W. Held, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated March 24, 1954.

Whereas, lately in a suit pending in the United States District Court for the District of Arizona, Phoenix Division, between Ralph W. Held, as plaintiff, and United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, as defendants, an Order was entered March 23, 1954, denying defendants' Motion for New Trial: denying in part defendants' Motion to Amend Findings and entering a money judgment against defendants and in favor of plaintiff, Ralph W. Held, all of which more fully appears from said Order of March 23, 1954, and

Whereas, United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, have filed a Notice of Appeal to reverse the said Order of March 23, 1954, insofar as the said Order denies defendants' Motion for New Trial; denies in part defendants' Motion to Amend Findings and grants a money judgment to the plaintiff, Ralph W. Held, said appeal being to United States Court of Appeals for the Ninth Circuit.

Now the Condition of This Obligation is such that if United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Whole-

sale, a corporation, shall prosecute their appeal to effect and satisfy the judgment in favor of Ralph W. Held, in full, together with costs, interest and damages for delay, if the appeal is dismissed or if the judgment is affirmed, and satisfy any modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, then the above obligation to be void; else to remain in full force and effect.

In Witness Whereof, United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, have caused these presents to be executed by their corporate officers thereunto duly authorized and said Fireman's Fund Indemnity Company, a corporate surety, has caused these presents to be executed by its attorney-in-fact thereunto duly authorized, all this 24th day of March, 1954.

UNITED PRODUCERS AND CONSUMERS
CO-OPERATIVE,

By /s/ D. O. ESSLEY,
President.

Attest:

[Seal] /s/ PAULINE McINERNEY,
Assistant Secretary.

SOUTHWEST CO-OPER-
ATIVE WHOLESALE,

By /s/ D. O. ESSLEY,
President.

Attest:

[Seal] /s/ PAULINE McINERNEY,
Assistant Secretary.

FIREMAN'S FUND
INDEMNITY COMPANY,

[Seal] By /s/ C. G. SULLIVAN,
Attorney-in-Fact.

State of Arizona,
County of Maricopa—ss.

Before me, the undersigned authority, on this day, personally appeared D. O. Essley, as President of both United Producers and Consumers Co-Operative and Southwest Co-Operative Wholesale, corporations, and Pauline McInerney, as Assistant Secretary of both of the aforesaid corporations, each being known to me to be the person whose name is signed to the foregoing bond and to be the officers thereof as respectively appears from said instrument, and each acknowledged to me that he executed the foregoing bond as the act and deed of said corporations, being thereunto duly authorized and qualified.

In Witness Whereof, I hereunto set my hand and official seal this 23rd day of March, 1954.

[Seal] /s/ HARRY E. PURDY,
Notary Public.

My commission expires March 25, 1957.

State of Arizona,
County of Maricopa—ss.

Before me, the undersigned authority, on this day personally appeared C. G. Sullivan, known to me to be the person whose name is affixed to the foregoing bond as Attorney-in-Fact for Fireman's Fund Indemnity Company, a corporation, and acknowledged to me that he executed the foregoing Supersedeas Bond as the act and deed of said Fireman's Fund Indemnity Company, a corporation, being thereunto duly authorized and qualified.

In Witness Whereof, I hereunto set my hand and official seal this 24th day of March, 1954.

[Seal] /s/ ALMA J. NORMAN,
Notary Public.

My commission expires 1-3-57.

Form of Bond and Sufficiency of Its Surety Approved:

/s/ DAVE W. LING,
United States District Judge
for the District of Arizona.

[Endorsed]: Filed March 24, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL

Good cause appearing therefor,

It Is Ordered that the time for filing the Record on Appeal and docketing the appeal herein in the

United States Court of Appeals for the Ninth Circuit be and it is extended to and including June 22, 1954.

Dated at Phoenix, Arizona, this 26th day of April, 1954.

/s/ DAVE W. LING,
United States District Judge.

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

STIPULATION AND ORDER OF SUBSTITUTION OF ATTORNEYS FOR DEFENDANTS

It is Hereby Stipulated that Scoville & Linton be substituted as attorneys of record for the Defendants, United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, in the above-entitled and numbered cause in the place and stead of Snell & Wilmer.

JENNINGS, SROUSS,
SALMON & TRASK,

By /s/ O. M. TRASK,
Attorneys for Plaintiff.

SNELL & WILMER,
By /s/ EDWARD JACOBSON,
Attorneys for Defendants.

SCOVILLE & LINTON,
By /s/ WALTER LINTON.

Order

Pursuant to the foregoing Stipulation.

It Is Hereby Ordered, Adjudged and Decreed that Scoville & Linton be substituted for Snell & Wilmer as attorneys for Defendants, United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, in the above-entitled and numbered cause.

Dated this 17th day of June, 1954.

/s/ DAVE W. LING,

United States District Judge
for the District of Arizona.

[Endorsed]: Filed June 17, 1954.

United States District Court
District of Arizona

1798 Civil

RALPH W. HELD,

Plaintiff,

vs.

UNITED PRODUCERS & CONSUMERS CO-
OPERATIVE, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing before the Honorable Dave W. Ling, one of the

judges of the above court, in his courtroom in the United States Courthouse, Phoenix, Arizona, on the 10th day of June, 1953.

Appearances:

OZELL M. TRASK,

L. M. LANEY.

Whereupon, the following proceedings were duly had:

The Clerk: 1798, Phoenix, Ralph W. Held, Plaintiff, vs. United Producers and Consumers Cooperative, et al., for trial.

The Court: Are you ready, gentlemen?

Mr. Trask: Plaintiff is ready.

Mr. Laney: Defendant is ready.

The Court: Very well, you may proceed.

Mr. Trask: Before the taking of evidence, the plaintiff would like to invoke the rule for the exclusion of witnesses.

The Court: All right.

(Discussion off the record.)

The Court: I don't think I will invoke the rule. Anybody who wants to stay here can stay.

(Opening statement by Mr. Trask.)

RALPH W. HELD

plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Trask:

Q. Would you state your name for the Court, please. A. Ralph W. Held.

Q. What is your present address, Mr. Held?

A. 5432 North Indiana, Kansas City, Missouri.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. What is your present occupation, Mr. Held?

A. I am manager of a co-operative having its office in North Kansas City known as Consumers Co-Operative Services, Inc.

Q. For the record, what is your age at the present time? A. 48.

Q. Mr. Held, prior to the time you came to Phoenix to manage the defendant corporations, had you had any experience in management of co-operative organizations? A. Yes, I had.

Q. Generally what was that experience?

A. Well in 1938 I became manager of the Farm Service Company at Storm Lake, Iowa, which was a co-operative company dealing largely in petroleum products and after 8 years in the service of that company I was made manager of the State Co-Operative Wholesale which was known as Iowa Farm Service [5*] Company at Des Moines, Iowa.

Q. How long did you serve with that company?

A. 6 years.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Testimony of Ralph W. Held.)

Q. Do you have any educational background generally to qualify you for work with agricultural co-operative organizations?

A. Well, I have a bachelor of science degree from Iowa State College at Ames, Iowa.

Q. What kind of school is that?

A. That is an agricultural land grant agricultural college.

Q. Is it a state institution? A. Yes, sir.

Q. And at that college what was your specialty or major or however they designate the principal emphasis of your education?

A. My degree was in agricultural.

Q. Prior to college did you have any practical experience in agricultural work, farm work?

A. Yes, I was born and reared on a 400-acre Iowa farm where usual farm practices were carried out and we had a herd of pure-bred livestock for some 50 years continuously on that farm and feed livestock in a rather large way.

Q. Your experience with co-operatives in [6] Iowa—in your experience what products did the co-operatives that you managed there handle?

A. The local co-operative I managed at Storm Lake, Iowa, dealt primarily in petroleum products, but it also handled some chemicals such as weed killers and dealt somewhat in fertilizer, but petroleum products were their biggest end of the business.

Q. Other than some variation in the type of products was there any essential difference in the

(Testimony of Ralph W. Held.)

type of business that you were managing in Iowa through your career and the type of business that was managed in Arizona?

A. No, there was no essential difference. There is some little difference in the major emphasis of commodities, but actually no essential difference in the type of business.

Q. Now what were you doing when you were first contacted about coming to Phoenix?

A. I was employed by the Iowa Farm Service Company at Des Moines, Iowa.

Q. In what capacity were you employed there?

A. I was in charge of the purchasing of all petroleum products and chemicals.

Q. How was that first contact made? How [7] did you first become aware of the Phoenix need for a manager?

A. I received a letter, I believe it was sometime in December from Mr. Martin of Southwest Co-Operative Wholesale.

Q. That was December of what year?

A. Of 1951.

Q. And that was the first contact that was made by the local organization with you?

A. Yes, sir.

Q. Did you answer that letter?

A. Yes, I did.

Q. Did anything develop immediately as a result of those two communications?

A. I think I had a reply early in January or the

(Testimony of Ralph W. Held.)

very latter part of December suggesting that since the——

Mr. Laney: Pardon me, may we have the letters? We object to the contents without the best evidence.

The Court: I don't know that he is going to say there was a letter.

Mr. Laney: He said what the letter suggested. I think the objection, if the Court pleases, was sound, that he was stating the contents of the letter. [8]

The Court: Well I didn't gather that. Go ahead.

A. Well the letter suggested a meeting in Chicago between myself, Mr. Walter Smith, who was president of, I believe, Southwest Co-Operative Wholesale and United Producers and Consumers, and Mr. Wahmsley. The occasion was the annual meeting of the National Council of Farmer Co-Operatives which all of us were attending.

Q. Did you attend that meeting? In Chicago?

A. Yes, sir.

Q. About when did that meeting in Chicago occur? A. About the middle of January.

Q. Of 1952? A. Yes, sir.

Q. Did Mr. Smith and Mr. Wahmsley contact you at that meeting? A. Yes, sir.

Q. You say Mr. Smith was president of both of the defendant organizations at that time?

A. That is my understanding.

Q. Did they tell you that? A. Yes, sir. [9]

Q. Was Mr. Wahmsley an officer or connected with those two organizations also?

(Testimony of Ralph W. Held.)

A. I understand that he was the auditor.

Q. What kind of meeting was in Chicago, Mr. Held?

A. Well, it was a very informal little meeting in Mr. Smith's room in the hotel.

Q. Excuse me for interrupting. What kind of meeting was the general meeting that all of you were attending in Chicago?

A. It was the annual meeting of the National Council of Farmer Co-Operatives, I believe.

Q. And were representatives of all the larger co-operatives in the United States present at that meeting?

A. Yes, and a great many other people that were directly interested in co-operatives in one way or another.

Q. Had Mr. Smith and Mr. Wahmsley desired to obtain information about you and your experience at that meeting, were the people at that meeting who were able to give them that information as to your record and your achievements and your progress?

A. Well, I would think they could have gotten it from quite a number of people that were there with [10] whom I was personally acquainted.

Q. And do you know whether they made any efforts to obtain such information or not?

A. I don't know that they did at that time. I don't know whether they did or not.

Q. Now, at that Chicago meeting did you have discussions with Mr. Smith and Mr. Wahmsley

Testimony of Ralph W. Held.)

about the Phoenix operation? A. Yes, I did.

Q. When and where did they occur?

A. Well, they occurred the first one was in Mr. Smith's room at the hotel at which we were staying where the meeting of the National Council of Farmer Co-Operatives was being held.

Q. And who was present at that meeting, Mr. Held?

A. Mr. Smith and Mr. Wahmsley and myself.

Q. What discussion took place there about the Phoenix situation and your connection with it, if any?

A. It was a very general discussion, more for the purpose of getting acquainted I think than anything else and Mr. Smith told me a little bit about the two corporations out here of which he was president and suggested that they were needing management and were [11] interested in talking to me about it. I believe at that time I told them that I had already been approached by a firm in St. Louis and while I hadn't made a positive commitment to them I was somewhat interested in that opportunity and wouldn't consider coming out here for less than a 3-year term.

Q. As a result of that conversation was there any suggestion made by either Mr. Smith or Mr. Wahmsley in furtherance of the Phoenix connection?

A. Well, we had 2 or 3 meetings there during the session of the National Council and I believe it was at the final meeting that we had that Mr.

(Testimony of Ralph W. Held.)

Smith suggested that he would like to have me come out and look the proposition over and would be glad to pay me my expenses if I would come.

Q. Had any final arrangement been made at that time of any kind between you?

A. No, sir.

Q. As a result of that offer by Mr. Smith, or suggestion, did you come to Phoenix?

A. Yes, I did, some week or more later.

Q. About when would that be, do you recall, Mr. Held?

A. I couldn't say the date positively, but it was in January of 1952. [12]

Q. Did the defendant corporations pay your expenses for that trip? A. Yes, they did.

Q. When you arrived in Phoenix who met you?

A. Mr. Smith met me at the plane at the Phoenix airport.

Q. Do you recall about when you arrived?

A. I arrived in the evening at about 9:00 o'clock.

Q. How long did you stay in Phoenix on that occasion?

A. I believe I was out here until—I believe I was out here 2 days.

Q. And what transpired during that time with respect to the matter that is under investigation here?

A. Well, the morning following my arrival Mr. Smith picked me up at the hotel and took me out to the plant and offices of the two corporations. I

Testimony of Ralph W. Held.)

met Mr. Martin, who was then manager and he showed me through the plant in the company of Mr. Smith.

Q. Do you know his initials?

A. C. M. Martin. We discussed the operation somewhat and I recall asking Mr. Martin how long he [13] thought it would take a new man coming in here to become thoroughly acquainted with the operation and he told me that he would——

Mr. Laney: Object to any conversation with Mr. Martin as hearsay. No foundation laid that he had any authority to bind any of these companies.

Q. Did Mr. Martin have any relation with the defendant companies at that time?

A. I understand he was manager.

Q. Was he also on the Board of Directors?

A. Yes, I believe he had the title of executive vice president.

Q. Then what did he say to you at that time?

Mr. Laney: I object. It calls for hearsay and no foundation laid, that he had any authority.

The Court: As I recall the evidence Martin wrote you a letter in December, didn't he?

The Witness: Yes.

The Court: Go ahead.

A. Mr. Martin said that he would delay answering my question until the following day at which time Mr. Smith and I were back in the offices and Mr. Martin said at that time that in his opinion it would [14] require from 2 to 5 years.

(Testimony of Ralph W. Held.)

Q. To learn the business thoroughly?

A. To get thoroughly grounded in the operation

Q. Now what else did you do on the occasion of that visit other than your trips around in the company of Mr. Smith and your conversations with Mr. Martin, the then manager?

A. The evening after I arrived here Mr. Smith invited me to a dinner at the Westward Ho Hotel at which several people representing the company were present.

Q. Who was present representing the company on that occasion?

A. Mr. Smith and his wife, Mr. and Mrs. Wahmsley and Mr. and Mrs. McInerney and Mr. and Mrs. Martin, I believe.

Q. Mrs. McInerney—what capacity did she have with the two organizations, to your knowledge?

A. Well, I understand that she was in charge of purchasing of some of the chemicals and feed supplies and so forth.

Q. Do you know whether she had an appointive office with the corporation?

A. I learned later that she did have. I [15] wasn't aware of it at that time.

Q. Following that dinner meeting, what transpired then?

A. The next morning Mr. Smith met me again and took me out to the company offices and that was when Mr. Martin gave me the reply that I earlier indicated. Following that, Mr. Smith drove

Testimony of Ralph W. Held.)

me around the Valley somewhat, took me out to his own farm and I left on a plane that evening for Des Moines.

Q. Did you have any further conversation with Mr. Smith on the occasion of that visit about coming to Phoenix as the manager of the defendant companies?

A. Nothing formal. He didn't make any offer and nothing actually was said about it except that he told me he hoped that I would be interested, to which I replied that I could not be under the circumstances because it appeared that they had management.

Q. You told him then that you were not interested under the present circumstances?

A. That is right.

Q. You returned then to your position in Des Moines? A. That is right. [16]

Q. When were you next contacted by anyone from Phoenix with respect to this employment?

A. I was contacted by telephone the latter part of February. Mr. Smith called me.

Q. Still talking about Mr. Smith, the president of both defendant corporations? A. Yes, sir.

Q. What was the nature of that conversation? What was it as you recall it?

A. I believe it was at that time that I told him that the situation with me had developed to a point that I felt that I was almost committed on a position in St. Louis and didn't believe I would be interested.

(Testimony of Ralph W. Held.)

Q. Why did Mr. Smith call you and you make those responses?

A. He called me and told me that their situation had also changed, that Mr. Martin had resigned and that they were definitely interested in making a proposition to me.

Q. Following that conversation what next took place?

A. I think it was just a couple of days later that he called me again, rather insistent that I come out and offered again to pay my expenses out [17] if I would come out and take a second look at their proposition.

Q. Did you come out at his request?

A. Yes, I did then finally and arrived here I believe the evening of March 5.

Q. 1952? A. 1952.

Q. Who met you when you arrived at that time?

A. Walter Smith met me in a plane and took me to my hotel that evening.

Q. How long did you stay in Phoenix on the occasion of that visit?

A. I left on the evening March 7.

Q. On the following day after your arrival March 6 what did you do?

A. Mr. Smith again called for me at the hotel in the morning, took me out to the plant and offices of the corporation. We spent a little time there. He drove me around the town just a little bit and we had a luncheon at the Westward

Testimony of Ralph W. Held.)

To Hotel that noon at which several of the company directors were present.

Q. Do you recall what of the company directors were present on that luncheon meeting?

A. I don't know whether I can recall all of [18] them or not but I know Dana Fisher was there. Mr. Smith of course was there. Emil Rovey was there. Mr. Wahmsley was present and I don't recall whether there were any others or not.

Q. Did you have any discussions at that luncheon meeting with either Mr. Smith or any of the other directors about becoming the manager of the local defendant corporation?

A. I don't think anything except just an informal discussion because there was a board meeting called for that afternoon of the entire board.

Q. Did you give any indication or were there any questions directed to you at that time concerning your qualifications or past experience, anything of that sort?

A. I can't recall any specific conversation at the dinner.

Q. Very well, then after the luncheon meeting did you attend the board meeting that was scheduled for that afternoon of March 6?

A. I attended a portion of it.

Q. And that was what kind of a meeting?

A. Well, I understood that that was a meeting of the full Board of both corporations and they called me in to interview me concerning accepting the [19] position as manager.

(Testimony of Ralph W. Held.)

Q. What discussion did you have at that meeting with the members of the Board? Did they make any inquiries of you, and tell the Court what those were?

A. Yes, they invited me into the meeting and asked me to relate my business experience which I had, which covered the period of management of the two co-operatives back in Iowa which I had previously managed and I think I went back to the time that I graduated from Iowa State College and spent 4 years as a county agricultural agent in one of the northwest Iowa counties and then spent 4 years as a farm loan representative for the farm loan division of the Aetna Life Insurance Company, after which I spent all of my time in co-operative management.

I believe I also told them that while I was here interested in their proposition that I was tentatively committed, at least I felt that I was, on a job in St. Louis with a corporation with which I had been familiar for some time, and that they were offering me a job at \$10,000 per year and that under the circumstances I couldn't consider coming out here for less than a 3-year term.

Q. Did any of the members of the Board of [20] Directors make any objection to your statement that you wouldn't consider coming out here for anything less than a 3-year term?

A. Not that I was aware of.

Q. Did any of them say anything at that time?

A. No, sir.

Testimony of Ralph W. Held.)

Q. Following your general discussion were you here when any action of the Board was taken with respect to your employment?

A. No, sir, I was not.

Q. Were you excused from the meeting before it was concluded? A. Yes, sir.

Q. And thereafter who did you next see with respect to employment after you left the meeting?

A. After the meeting was over, Walter Smith took me back to the hotel and suggested that he had arranged a meeting for me or a dinner engagement for me that evening with Mr. Wahmsley and that since Mr. Wahmsley was auditor of the 2 corporations he had information that wasn't as well known to Mr. Smith and that he would therefore like to have me spend some time visiting with Mr. Wahmsley about this matter.

Q. Did he say anything to you at that [21] time as to any authorization to enter into a contract?

A. He told me that the Board had given him authority to employ me and wanted me to talk to Mr. Wahmsley—to talk to me the following day.

Q. Up to that time had you discussed any of the details of your employment with either Mr. Smith or Mr. Wahmsley? That is, regarding the amount of compensation and the term of your employment and so forth?

A. Yes, we had talked about a 3-year term and we had talked more or less informally about—
Mr. Laney: Who had?

(Testimony of Ralph W. Held.)

Q. You had talked with whom?

A. With Mr. Smith and we discussed a 3-year term and had discussed a \$10,000 annual salary with some percentage of the net savings of the 2 companies.

Q. Then did you keep the engagement that Mr. Smith had made for you with Mr. Wahmsley that evening?

A. Yes, we had dinner that evening at the Arizona Club and spent an hour or 2 together.

Q. Who was present at that meeting?

A. Just Mr. Wahmsley and myself.

Q. And did you and Mr. Wahmsley discuss—what did you discuss during that hour or two that you were together? [22]

A. I think we discussed primarily the terms of employment dealing principally with salary percentage of the net savings and term of employment.

Q. What was the discussion with Mr. Wahmsley concerning the term of employment?

A. Primarily had to do with the 3-year term because I had indicated early that that was the only thing that I would be interested in.

Q. Did Mr. Wahmsley make any objection to that? A. Not to my knowledge.

Q. Did he say anything upon that occasion objecting to it at all?

A. I don't recall that he did.

Q. Was there any discussion as to the specific amount of compensation? That is, the fixed compensation?

Testimony of Ralph W. Held.)

A. I think we were discussing primarily \$10,000 per year.

Q. Now what day was this that you had the inner meeting with Mr. Wahmsley?

A. That would have been the evening of March 6.

Q. Then after—did you return to your hotel after your meeting with Mr. Wahmsley?

A. Yes, sir.

Q. What took place on March 7? [23]

A. Mr. Smith called for me again at the hotel in the morning, took me on quite an extended tour of the valley here, and brought me back to the hotel sometime that—I mean the company offices sometime that afternoon.

Q. Did you have any further discussion about our contract that afternoon with Mr. Smith?

A. Yes, we did. We discussed it further in the office.

Q. That is in the office of the——

A. Of the two corporations.

Q. Following that conversation what was done?

A. Well, late that afternoon Mr. Smith rather insisted that we draw up a memorandum of agreement. I informed him that I didn't feel personally that it was necessary, that I had never worked under a written contract and it would be perfectly agreeable with me if we would wait until I actually decided to accept the position and if I came out here the 1st of April, to draw up an agreement at that time. However, he wanted something in writ-

(Testimony of Ralph W. Held.)

ing, he said, and we therefore prepared the type of contract under which I was employed.

Q. Who was present at the time the agreement that you have testified about was prepared? [24]

A. Walter Smith, Mrs. McInerney and myself.

Q. Who dictated the terms of it or prepared it, Mr. Held?

A. Well, Mr. Smith asked me to dictate it, said he wasn't familiar with such matters, and I believe before we got into that I advised him that since he didn't have a form available, that I did have with me a copy of a contract that was used by the member companies of the Iowa Farm Service Company for the employment of managers. It was a three-page document which was multigraphed and which we used among all of our companies associated with the Iowa Farm Service Company and from that we simply dictated 3 or 4 short paragraphs on which Mr. Smith and I agreed and which we thought would be sufficient to cover the matter.

Q. When you say you dictated them, to whom did you dictate the agreement?

A. To Mrs. McInerney.

Q. And that is the Mrs. McInerney who you have testified was the appointive officer of the corporation of some sort.

A. Yes, sir.

Q. And that was on the late afternoon or early evening of—— [25]

A. March 7.

Q. What was done with the agreement which was dictated at that time?

(Testimony of Ralph W. Held.)

A. That was written up in triplicate and Mr. Smith signed 2 copies which he handed to me and suggested that I take them back to Des Moines, Iowa, with me and if I decided to come out here, to sign a copy and send one back to him.

Q. Did you sign the contract at that time?

A. No, sir, I did not. I had a tentative appointment in St. Louis for, I believe, it was March 15 with Mr. K. C. Baker with whom I was negotiating about this job that I had mentioned previously and upon my return home I found that Mr. Baker had advised me by letter that he wouldn't be able to keep that appointment and suggested that I meet him in St. Louis on the 20th, after which I notified Mr. Smith that I was signing a copy of the contract and mailing it to him.

Q. Now, you say that you took the two signed copies that Mr. Smith had signed back to Des Moines with you pending your determination of the St. Louis offer? A. Yes, sir.

Q. And then when you—when did you determine in your mind what you wanted to do about the St. Louis [26] offer, Mr. Held?

A. When I was in St. Louis on March 20.

Q. And was that offer still available to you and could you have accepted it in St. Louis at that time had you wanted to? A. Yes, sir, I could have.

Q. And you came back to Des Moines and what was the occasion of any further communication with Mr. Smith?

A. Well, I arrived back in Des Moines in the

(Testimony of Ralph W. Held.)

early morning of March 20 and found a long distance telephone call waiting for me when I arrived at home. I called back on that call and talked to Mr. Smith concerning the matter, told him that I would sign the contract, and he asked me to come out here and be ready to go to work on the first day of April.

Q. Did you tell him that you were putting a signed copy of the contract in the mail?

A. Yes, sir, I mailed it the next morning, I believe.

Q. And you signed it and went out the next morning? A. I think that was it.

Q. I show you Plaintiff's Exhibit 1 for identification and ask you to state whether or not that is [27] the contract about which you have just been testifying? A. Yes, sir, that is it.

Mr. Trask: Offer it in evidence.

Mr. Laney: If it please the Court, we object to this on the ground that there is no foundation laid that Smith was authorized to enter into any such contract.

The Court: It may be received. We will have our morning recess.

(A brief recess was had.)

(Plaintiff's Exhibit 1 received in evidence.)

Q. Mr. Held, at the time when you were present with Mr. Smith in the company's offices after the contract had been dictated to Mrs. McInerney and

Testimony of Ralph W. Held.)

was executed by Mr. Smith on behalf of the two corporations, was Mrs. McInerney present during that entire period of time? A. Yes, sir.

Q. Was she present at the time Mr. Smith executed the document on behalf of the two corporations? A. Yes, sir.

Q. Did she offer any objection or suggestions as to the manner of execution in any way?

A. No, sir.

Q. Now after you telephoned or after Mr. [28] Smith telephoned you in Des Moines and you told him that you were signing the contract and putting it into the mails to him, did you hear anything further from Phoenix before you actually came out here to assume your duties?

A. Yes, I had a wire, I believe, from Mrs. McInerney the latter part of March stating that Mr. Smith had passed away very suddenly and giving me the date of his funeral. I called her on the telephone and told her that I was very sorry, but it didn't appear that it would be possible for me to get out here to the funeral and that I would be out here the 1st of March, I mean the 1st of April.

Q. Did you come to Phoenix on the 1st of April?

A. Yes, sir, I actually arrived here on March 31.

Q. And on the 1st of April what did you do?

A. I went to the office first on March 31 and then went there again on the morning of April 1 and assumed the management of the company.

Q. You did go to work at the company offices and assume the duties of manager at that time?

(Testimony of Ralph W. Held.)

A. Yes, sir.

Q. During the month of April did you ever [29] meet with any of the members of the Board of Directors or see any of them in your capacity as manager?

A. Yes, sir, there was a board meeting soon after I came here, I believe it was on the 3rd of April. I think it was called specifically for the purpose of electing a successor to Mr. Smith as president.

Q. Did you attend that meeting of the Board of Directors? A. Yes, sir.

Q. And did you attend any other meetings of the Board of Directors while you were—during the month of April?

A. Yes, there was another board meeting called the latter part of the month along about the 24th or 25th, I believe, somewhere in that approximate time.

Q. Now, at any time after you reported for duty or before you reported for duty, at any time did the officers of the corporation or the members of the Board of Directors at any time give you any special instructions as to how you were to go about acquainting yourself with the business or with the community and your affairs?

A. No, they did not. [30]

Q. Beginning then April 1, generally what did you do in connection with the management of the corporation?

A. Well, that first week I was in the office most of the time. I believe I made a trip out to Mrs.

(Testimony of Ralph W. Held.)

W. L. Smith at Glendale one afternoon to extend my sympathy for the loss of her husband. The second week I called on the members of Southwest Co-Operative Wholesale who were other co-operatives most of which were located in Southern California.

Q. Was that in connection with your duties as manager of the defendant corporation?

A. Yes, sir, these corporations were members of Southwest Co-Operative Wholesale and the corporation that I had been managing had some 30 members and all of them bought their supplies from us and I wanted to find out what the state of affairs was between Southwest Co-Operative Wholesale and its member companies.

Q. And that took up most of your time during the second week of April, did it?

A. Yes, sir, it did.

Q. Did you have any conversations or go out and make any effort to meet any members of the Board individually, talk to them?

A. Yes, most of the week following my contact with [31] the co-operative companies I spent calling on various members of the Board of Directors.

Q. And where would you call on the members of the Board?

A. I found most of them at their farms and ranches.

Q. Are the members of the Board of Directors of these two companies—do they spend all of their

(Testimony of Ralph W. Held.)

time at the company offices or do they have other occupations and pursuits?

A. Well, I don't think you would say they spend any of their time there, to speak of. They call there occasionally like maybe any other customer might, but they spent no appreciable time there.

Q. Generally what are their occupations, the members of the Board of Directors, their principal occupation?

A. Most of them I would say were engaged in agriculture.

Q. Now during the first month that you were there did you meet any of the department heads or the staff heads of the various departments of the defendant corporation?

A. Yes, sir, the first week that I was there [32] Ernie Huber took me around and introduced me to all of the department heads.

Q. Who is Ernie Huber?

A. He is an employee who was described to me as being in general supervision over the various stores down there.

Q. What stores? When you say the stores of the co-operative what stores do you refer to?

A. The hardware store, the lumber yard, the furniture store, probably even the feed store.

Q. Now, did you hold during the month of April any staff meetings with the members of the various heads of departments of the co-operative down there?

A. We held staff meetings during the time I

(Testimony of Ralph W. Held.)

was there, but I am not clear on the date when we first initiated them. We held some 2 or 3 staff meetings.

Q. By staff meetings what do you mean?

A. Meetings of the heads of the various departments.

Q. Those meetings were called by whom?

A. By myself.

Q. During the month of May, for instance, did you hold any staff meetings? [33]

A. Yes, I am quite sure that we had two in May.

Q. Without going into any detail, what was the general nature and purpose of the staff meetings and how were they held?

A. They were held in my office for the purpose of discussing any of the problems that the heads of the various departments thought might be of general interest to the heads of all of the other departments.

Q. And those staff meetings were held, how many do you recall did you hold?

A. Well, we held 2 in May and I am not clear on whether we actually held a staff meeting in April or not.

Q. You say there were 2 meetings of the Board of Directors which you attended during the month of April?

A. Yes, sir.

Q. Was there any meeting of the Board of Directors you attended during the month of May?

A. Yes, sir.

(Testimony of Ralph W. Held.)

Q. About when was that?

A. It was about the 24th or 25th of May, approximately that period. [34]

Q. Now, Mr. Held, up to that time had you been criticized in any way by any officer or director of the corporation as to the manner in which you were performing your duties as manager?

A. No, sir.

Q. About what time was the meeting in May that you referred to? What date?

A. It was the latter part of the month, I have forgotten the exact date, 24th, 25th, or 26th, somewhere in that period.

Q. Did you attend these various meetings of the Board of Directors as you have testified about as manager of the corporation? A. Yes, sir.

Q. After the meeting of the Board of Directors on May—the latter part of May, whenever it was, what did you do?

A. Well, it was that evening that I had planned to fly back to Des Moines to bring my family out here since school had terminated and I had given possession of my home on the 1st of June.

Q. Had you ever discussed with the members of the Board of Directors the necessity for your returning to Des Moines to bring your family out? Had that been mentioned at any time? [35]

A. I don't think it had been officially in a board meeting, but I had mentioned to various ones at various times that that was the situation and Walter Smith had agreed that that was the proper thing

Testimony of Ralph W. Held.)

Q. To do and Emil Rovey asked me that day when I was going back after my family and I told him that I planned to go back that evening.

Q. And what is Emil Rovey's capacity with either of the corporations?

A. He is a director.

Q. Did any of them ever voice any objection to our making that trip to get your family and bring them out here? A. No, sir.

Q. And you did return to your home in Des Moines to bring your family? A. Yes, sir.

Q. What arrangements had you made in Des Moines for bringing your family out here?

A. Well, prior to that time I had sold my home and had given possession on June 1 and had planned to go back when the spring school term ended to bring them out to Phoenix.

Q. And had those arrangements been completed for the sale of your home and giving possession when you [36] arrived there? A. Yes, sir.

Q. Did you receive a telegram while you were here from the defendant corporations or one of their representatives?

A. Yes, sir, we had finished packing our furniture one night and were planning to leave for Phoenix the next morning and a wire reached me I believe about 1:00 or 2:00 that morning.

Q. That is the same morning that you were planning to leave and come to Phoenix with your family? A. Yes, sir.

Q. You had stored your furniture at that time?

(Testimony of Ralph W. Held.)

A. We hadn't stored it yet because we were planning to load it on a moving van that morning to bring it out here.

Q. I hand you Plaintiff's Exhibit 2 for identification and ask you to state, is that the telegram that you state you received at that time?

A. Yes, sir.

Mr. Trask: Offer Plaintiff's 2 in evidence.

Mr. Laney: No objection. [37]

(Plaintiff's Exhibit 2 received in evidence.)

Q. Following the receipt of that telegram did that require you to make any change in your plans or did you make any change in your plans?

A. Yes, sir, I had to find temporary living quarters for my family almost immediately and I consulted counsel in Des Moines to determine what my position was.

Q. Up to that time had there been any suggestion of any kind that your contract was illegal or being questioned? A. No, sir.

Q. Was there any elaboration given you at that time as to what the supposed illegality of your contract was?

A. No, sir, the wire was the only communication.

Q. Had you been criticized as to your employment or charged with any violation of the terms of your employment up to that time?

A. No, sir, not to my knowledge.

Q. Following the receipt of the telegram you say you did consult counsel? A. Yes, sir.

Testimony of Ralph W. Held.)

Q. And thereafter what did you do? [38]

A. He advised me to——

Q. No, just what—did you respond to the telegram?
A. Yes.

Q. I show you Plaintiff's 3 for identification and ask you to state what that is.

A. That is the wire that I sent in response to the telegram sent me.

Mr. Trask: Offer Plaintiff's Exhibit 3 for identification, exhibit next in evidence.

Mr. Laney: No objection.

(Plaintiff's Exhibit 3 received in evidence.)

Q. Following the mailing of that or the transmitting of that telegram to Mr. Essley, what did you do, Mr. Held?

A. I took my family to Sioux City, Iowa, where I arranged for temporary living quarters for them, came back to Des Moines and flew out to Phoenix.

Q. When you arrived in Phoenix did you go to see anybody with respect to the communication you had received?

A. Yes, I did. I called on several members of the Board of Directors.

Q. Did you call on Mr. Essley, who sent you the telegram? [39]
A. Yes, sir.

Q. Where did you see him and when?

A. I saw Mr. Essley at his farm. I don't recall the day exactly.

Q. Was it shortly after you returned?

A. Shortly after I returned.

(Testimony of Ralph W. Held.)

Q. Was anyone else present at that time?

A. I don't recall that there was. His son was working on some machinery near there when we discussed this wire.

Q. What did you say to Mr. Essley and what did he say to you?

A. I think I called his attention to the fact that I had gotten his wire and merely expressed the fact that I was surprised to have received word in that sort of way since we had had a board meeting just prior to my going back after the family and no one had said anything to me.

Q. And what did he say to you?

A. He told me that they had a board meeting called for the 9th of June and would discuss the entire matter at that time.

Q. Did he give you any reason for suspecting your contract was in question?

A. Not specifically that I recall. [40]

Q. Did he at that time say you hadn't been performing your duties properly?

A. No, he didn't.

Q. Did he charge you with any violation of your contract?

A. No, sir.

Q. What other members of the board did you call upon as a result of this receiving of the wire?

A. Before I called on Mr. Essley I stopped at Mr. Rovey's farm on my way out and had a little discussion with him also.

Q. Mr. Rovey is one of the directors?

A. Yes, sir.

Testimony of Ralph W. Held.)

Q. What was your conversation with Mr. Rovey and what did he say to you?

A. I told him about the wire that I had received and asked him if he knew anything about it. He said that he didn't know a great deal about it and suggested that possibly the man to talk to was Mr. Jessley.

Q. Did he charge you at that time with any violation of the terms of your contract?

A. No, sir.

Q. Did he criticize your manner of conducting yourself as manager at that time? [41]

A. Not to my knowledge.

Q. Did he at that time? A. No, sir.

Q. Did he elaborate in any way upon the meaning of the telegram that your contract was illegal?

A. No, sir.

Q. Did you discuss the telegram with any other members of the Board of Directors prior to the meeting of June 9?

A. Yes, sir, I called on Mr. Knox and Mr. Fisher.

Q. Who is Mr. Knox?

A. Mr. Knox was a board member and I believe secretary of one of the companies.

Q. And where does he live?

A. At Chandler or near Chandler, Arizona.

Q. What was your conversation with Mr. Knox?

A. I told him also about the wire and he was surprised to learn it. He had no previous knowledge of it whatever.

(Testimony of Ralph W. Held.)

Q. So he had no explanation and didn't know anything about it? A. No. [42]

Q. That is what he said to you?

A. That is right.

Q. Who is Mr. Fisher?

A. Mr. Fisher is also a board member who lives at Blythe, California, and he likewise had no previous knowledge and did not know until I advised him that I had received such a wire.

Q. Did either Mr. Knox or Mr. Fisher say anything to you in a way critical of the way you had managed the corporation or charging you with any violation of the terms of your contract?

A. No, sir, they did not.

Q. Did you hear anything further about the matter until the meeting of June 9?

A. No, I don't believe I did.

Q. Actually how many days transpired between your meeting with these various members of the board and the meeting of June 9? Was it a short period of time?

A. Just a short period of time, yes.

Q. Now on June 9 was there a meeting of the Board of Directors held to your knowledge?

A. Yes, sir.

Q. Where was it held?

A. In the company office at the plant. [43]

Q. Did you attend that meeting?

A. No, sir, I did not.

Q. Was that the first meeting of the Board of

(Testimony of Ralph W. Held.)

Directors since you arrived in Phoenix that you did not attend?

A. I attended a portion of it, but I was not in the meeting all of the time.

Q. Was there any discussion during the time you were at the meeting during the portion of the meeting that you attended, was the matter of your contract discussed during that period of time?

A. No, only that Mr. Essley advised me that they had had it under consideration and he told me that they considered that they had placed me in an impossible position and had appointed a committee to negotiate with me for the settlement of my contract.

Q. Now at the beginning of the meeting were you in the meeting at the beginning of it when it was started, the meeting of June 9?

A. I think I was right at the beginning and the meeting went into executive session almost immediately and I left.

Q. And when did you have this conversation with Mr. Essley that you have related? Did he call you back into the meeting? [44]

A. After I was called back into the meeting.

Q. Now after he called—Mr. Essley called you back into the meeting and told you they felt they had placed you in an impossible position and wanted to negotiate with you about the settlement of your contract, at that time did Mr. Essley inform you as to what the alleged illegality of your contract was?

A. I don't recall that he did, no.

(Testimony of Ralph W. Held.)

Q. Did he at that time or any other member of the board charge you with any violation of your contract? A. No, sir.

Q. Or make any criticism—Mr. Essley or any other member of the board, about the way in which you had gone about starting your duties as manager under your contract? A. No, sir.

Q. Did he tell you who the members of the committee were who were going to negotiate with you about the settlement of your contract?

A. Yes, he did.

Q. Who were they?

A. Mr. Essley and Mr. Ashby and Mr. [45] Rovey.

Q. Mr. Ashby likewise is a member of the Board of Directors? A. Yes, sir.

Q. Subsequent to that did you meet with that committee for the purpose of discussing the settlement of your contract? A. Yes, sir, I did.

Q. When did you have your first meeting?

A. Well, it was immediately after the board meeting that same afternoon.

Q. And who was present at that meeting?

A. The 3 members of the committee that I have just named and myself.

Q. Did any of the members of the committee at that time accuse you of any violation of the contract or criticize the manner of your operation of the companies?

A. I don't remember whether they did specifically or not.

Testimony of Ralph W. Held.)

Q. There was a discussion about the settlement of your contract? A. Yes, there was.

Q. Was there any conclusion arrived at at that time? A. No, there was not. [46]

Q. Did they tell you at that time that you were dismissed or terminated your contract—your contract had been terminated? A. No, sir.

Q. Did you continue to perform your duties as manager thereafter?

A. Yes, sir, until June 20.

Q. And on June 20 what took place?

A. They held a second board meeting on June 20 at the close of which I was handed a statement advising me that my contract was considered at an end.

Q. Following the receipt of those formal notices of termination you left the employment and your place of employment? A. Yes, sir.

Q. What wages have you received under the terms of your contract?

A. I was paid my regular monthly salary during the period that I was there.

Q. Have you received any payments since of any kind? A. No, sir.

Q. I hand you Plaintiff's Exhibit 4 and Plaintiff's Exhibit 5 for identification and ask you [47] to state whether or not those are the notices of termination that you have testified about?

A. Yes, sir.

Mr. Trask: I offer Plaintiff's Exhibits 4 and 5 for identification in evidence.

(Testimony of Ralph W. Held.)

Mr. Laney: No objection.

(Plaintiff's Exhibits 4 and 5 received in evidence.)

Q. Mr. Held, Plaintiff's 4 in evidence is a communication from United Producers and Consumers Co-Operative, one of the defendants, is it not?

A. Yes, sir.

Q. And 5 is a similar communication from Southwest Co-Operative Wholesale?

A. Yes, sir.

Q. Mr. Held, following the receipt of these formal notices and your relinquishing of your position at the defendant corporation, how long was it before you obtained any other employment?

A. I went to work on the first day of September following that.

Q. With what concern did you go to work?

A. With the company that presently employs me, Consumers Co-Operative Services, Inc., North Kansas City, Missouri.

Q. In what capacity did you go to work [48] there? A. As general manager.

Q. Did you commence to take steps as soon as reasonably possible after your termination here to find other employment? A. Yes, sir.

Q. In this action, Mr. Held, you have stated that your damages have been computed at a sum of approximately \$25,410. How did you compute those damages?

A. Well, it was computed on the basis of a

Testimony of Ralph W. Held.)

\$10,000 annual salary for a 3-year term and 2% of the net savings of the 2 corporations for the 2 final years of that 3-year term.

Q. Now the fixed compensation therefore for the 3 years would be \$30,000? A. \$30,000.

Q. And——

A. \$16,000 for the 2% of the net during the 2 final years on which I had been given to understand that that amounted to approximately \$400,000 during 1951 which was the year previous to my coming out here.

Q. That would be \$30,000 fixed compensation and \$16,000 at 2% or a total of \$46,000 and did you make any deduction from that total of \$46,000?

A. Yes, sir. We tried to estimate what I [49] might earn in other employment and we estimated \$8,000 a year for 3 years which was \$24,000 and which we deducted from the \$46,000.

Q. You keep saying “we.” You were consulting with me at the time that you were making this computation, were you? A. Yes, sir.

Q. So you computed your damages as the result of the loss of earnings at the contract value of \$46,000 less 3 years’ employment that you anticipated you would be able to earn \$8,000 a year \$24,000, leaving a net of \$22,000? A. That is right.

Q. Mr. Held, in addition to the \$22,000 did you sustain any particular or special damages as a result of the breach of contract by these defendants?

Mr. Laney: Just a moment. May it please the Court, I object to that. There is no allegation of

(Testimony of Ralph W. Held.)

special damages of any sort, just allegation of general damages from breach of the contract.

Mr. Trask: May I rephrase the question.

Q. In addition to the \$22,000 loss of contract earnings, what other items are included in that figure of \$25,000, approximately?

A. Well, there was an item of about \$454 [50] of travel expenses, I believe.

Q. Now that was in connection with——

A. It involved 2 trips out here and back.

Q. You are not referring to the trips that the companies paid your expenses out and back?

A. No, sir.

Q. And then what other item did you have in that figure of \$25,000?

A. There was an item of \$500 moving expense and storage of furniture and so forth.

Q. What other items did you have?

Mr. Laney: Object to that. May it please the Court, move that be stricken out. That is a claim of special damages. It wouldn't be relevant damages if there were damages in that it doesn't naturally flow from the contract, no allegation of any such special damages.

The Court: You may answer.

Q. What other items went to make up the total figure that you have stated in your complaint, Mr. Held?

A. There was an item of \$21,000 which was a down payment on a house that I bought here in Phoenix.

Testimony of Ralph W. Held.)

Mr. Laney: If it please the Court, I move that that answer be stricken out on the ground [51] there is no allegation in the complaint of any such special damages and it is not damages that would naturally flow from any breach of contract, immaterial and irrelevant.

The Court: It may stand for the time being, the Court may disregard it later, I don't know.

Q. I hand you Plaintiff's Exhibit No. 6 for identification and ask you to state what that exhibit is, Mr. Held.

A. It is the escrow instructions in connection with the purchase of the house.

Mr. Trask: Offer Plaintiff's Exhibit 6. If the Court please, this offer is made to show the agreement and the down payment that was made on the home and it is offered for the purpose of showing that that down payment was lost and forfeited as a result of the breach of contract.

Mr. Laney: May it please the Court, as to Plaintiff's Exhibit 6 for identification we object to that as irrelevant to any issues in this case. In the first place it is not an element of damages but in the second place if it were it would be at most an element of special damages—claimed special damages—and the Court rules require that special damages be specifically pleaded and they are not pleaded. We [52] object to them.

The Court: May be received subject to objection.

(Plaintiff's Exhibit 6 received in evidence.)

(Testimony of Ralph W. Held.)

Q. Mr. Held, pursuant to the terms of the escrow agreement that has just been received in evidence and which you have examined, did you make a deposit of a certain sum of money in connection with the purchase of a house here? A. Yes, sir.

Mr. Laney: Would counsel and the Court pardon me. I don't want to repeat my objection but may it be understood that the same objection applies to this line of questioning.

The Court: Yes.

Q. Did you make a deposit? A. Yes, sir.

Q. How much was that? A. \$2100.

Q. What happened to that money that was deposited? A. It was forfeited.

Q. Did you receive any portion of it back?

A. No, sir. [53]

Q. I show you Plaintiff's Exhibit 7 for identification and ask you to state if that is the notice of forfeiture. A. Yes, sir.

Mr. Trask: Plaintiff offers Plaintiff's Exhibit 7. It is a notice of forfeiture pursuant to the terms of the escrow agreement.

(Plaintiff's Exhibit 7 marked for identification.)

(Plaintiff's Exhibit 7 received in evidence.)

Q. In addition to the elements that you have heretofore testified to that went to make up the total of the amount stated you were damaged were there any other elements included in that total figure, Mr. Held?

Testimony of Ralph W. Held.)

A. I think we entered an item of \$106.50 for cancellation of escrow which I found out later was covered in the \$2100.

Q. So that as far as that \$106.50 that was not an item of expense or damage to you?

A. No, it was not.

Q. Were there any other items you included in that figure at the time you made your computation?

A. Yes, I put in an item of \$250 legal expenses.

Q. That was paid to me at that time? [54]

A. Yes, sir.

Q. Have you ever paid the statement or bill from the attorneys that you employed to consult with at the time you received Mr. Essley's telegram?

A. No, I have not. They have not yet rendered their statement.

Q. You do not know what that amount might be?

A. No, I do not.

Mr. Laney: May it please the Court, I move to strike out the testimony of legal expense because it is no part of the damage and no claim that it was any special damage in the pleading. It wouldn't be relevant anyway.

The Court: It may stand for the time being. You are probably right.

Mr. Laney: I think counsel is probably right about that. At the time this was computed it was put in.

Q. Mr. Held, at the time you had your meeting

(Testimony of Ralph W. Held.)

with Mr. Wahmsley, the auditor of the company, was there any discussion of a computation of a percentage figure in addition to your fixed compensation? A. Yes. [55]

Mr. Laney: May we see which meeting he is talking about?

The Court: All right.

Q. Was there any such meeting at which there was such a discussion? A. Yes.

Q. What meeting was that?

A. At the time we had dinner at the Arizona Club which would have been March 6.

Q. You and Mr. Wahmsley were present?

A. Yes, sir.

Q. Anyone else present with you?

A. No, sir.

Q. And what was the discussion of a figure for compensation in addition to the fixed income feature of the contract?

A. I think we discussed 2% and 5% both, but we pretty well agreed that 2% would be proper since on that basis it would amount to approximately \$8,000 per year on the basis of 1951 history.

Q. And did Mr. Wahmsley at that time and you discuss a net income figure upon which the 2% would operate and discuss a tentative figure how that would come out for your contract?

A. Yes, sir.

Q. And what figure did Mr. Wahmsley give [56] you at that time if any as a net income figure upon

Testimony of Ralph W. Held.)

which the 2% or whatever per cent you agreed upon could operate?

A. Well, it was on the basis of the net savings of the 2 companies which for the previous year I understand were approximately \$400,000.

Q. When you say you understand, how did you arrive at that? How did you get that figure?

A. That was the figure that Mr. Wahmsley mentioned several times.

Q. Now you have used the expression net savings. Is that different from net income?

Mr. Laney: Object to that as calling for his legal conclusion, interpreting the contract. The contract says net income.

Mr. Trask: The contract uses the terminology net income. I am asking the witness to give an explanation of what the figures they were talking about at that time upon which the net was intended to operate and he has used a figure net savings and therefore would like to ask him to explain the meaning of the term net savings as applied to co-operative enterprises.

The Court: All right.

Mr. Laney: My objection is he is calling for an interpretation. [57]

The Court: Well, the Court is going to have to decide this some way. You will go into it.

Mr. Laney: Very well.

A. Net savings and net income are used somewhat interchangeably in co-operative terminology. Actual net income probably strictly construed would

(Testimony of Ralph W. Held.)

be the net on which a co-operative, if it is a taxable one, would pay taxes and which would be after refunds had been excluded. Net savings is normally considered to be income prior to the payment of patronage refunds.

Q. Now the figure of net, either savings or income, whatever it is, whatever the term is—that is the figure upon which you were negotiating with Mr. Wahmsley and the basis—approximately what figure based on the previous year's earnings?

A. Somewhere in the neighborhood of \$400,000.

Q. Mr. Wahmsley, did he at that time show you any of their annual reports to show how they were designated on the report itself?

A. Not at that particular meeting, no.

Q. And were you shown prior to the time that you actually signed the contract a copy of the report so that you could see how the net was indicated on the report itself whether the terminology was net savings or net income? Were you shown a copy of the annual report? [58]

A. I saw a copy of the annual audit, yes.

Q. Prior to the time you signed the contract?

A. Yes, sir.

Q. And do you recall now how that was designated on the annual audit?

A. I couldn't positively say.

The Court: We will suspend at this point until 1:30.

(Whereupon, the regular noon recess was taken.) [59]

RALPH W. HELD

sumed the stand and testified further as follows:

Direct Examination

(Continued)

y Mr. Trask:

Q. Mr. Held, what is your present compensation? A. \$8,100 per year.

Q. That is at the firm you now are employed in Kansas City? A. Yes, sir.

Q. Is that on an annual basis?

A. Yes, sir.

Q. Did anyone ever tell you on behalf of the corporation or on behalf of anyone else that Mr. Smith and Wahmsley were both required to sign our contract? A. No, sir.

Q. Did anyone either Mr. Wahmsley or any member of the Board ever object to any of the terms of your contract or suggest that any of the terms be modified or altered in any respect?

A. Not in my presence, sir.

Q. Was a copy of that contract in the files so far as you know at all times after March 22 when you [60] had your meeting with Mr. Smith?

A. As far as I know and the triplicate copy I think remained there from the date that it was drawn up which would have been March 7.

Q. Were you ever shown the minutes authorizing the matter of your employment?

A. No, sir.

Mr. Trask: I believe that is all. [61]

(Testimony of Ralph W. Held.)

Cross-Examination

By Mr. Laney:

Q. Mr. Held, your first correspondence, you say, was with Mr. C. M. Martin, the correspondence about these companies here? A. Yes, sir.

Q. And I believe with his first letter he sent you a copy of the bylaws and articles of incorporation, did he? A. I think that is right.

Q. You have that letter, or your counsel have it, that first letter, have you? A. I think so.

(Defendant's Exhibit A marked for identification.)

Q. Calling your attention to Defendant's Exhibit A for identification, that is the letter you have spoken of that was sent to you by Mr. Martin, is it?

A. Yes, sir.

Q. Now, calling your attention to the following language—"I am enclosing herewith a copy of the articles of incorporation and bylaws of our association together with a financial statement as of the close of business on October 31, 1951." Now, he did enclose a copy of the articles of incorporation [62] and the bylaws, did he? A. Yes, sir.

Q. And you have those in your possession or your attorney has—that he enclosed?

A. I have a copy of them. Whether it is the same identical copy that he enclosed I do not know.

Q. Well, it is the copy that you got from Mr. Martin, is it not?

(Testimony of Ralph W. Held.)

A. No, that particular copy was returned to him.

Q. Returned to the office or to Martin personally or where?

A. It was mailed to the company office sometime in February, I believe.

Q. Copy of what?

A. The articles and the financial statement mentioned in that letter were all returned by mail.

Q. And how about the bylaws?

A. Yes, sir, also. They were returned also.

Q. The copy of the bylaws that you now have—they are of which company?

A. Well, I have copies of both companies' bylaws.

Q. And when did you get those?

A. Those were in my desk at the office. [63]

Q. But when did you get them?

A. I don't know that I can particularly recall. I saw them there sometime in April or May.

Q. Then the letter of December 17, 1951, that was a letter signed "Southwest Cooperative Wholesale" by Martin, wasn't it?

A. Yes, sir.

Mr. Laney: I offer that in evidence.

Mr. Trask: No objection.

(Defendant's Exhibit A received in evidence.)

Q. You at that time read the bylaws, of course, that were sent you, didn't you?

A. I looked them over casually.

Q. And they were the bylaws of which company?

(Testimony of Ralph W. Held.)

A. I think it was the Southwest.

Q. Southwest Co-Operative Wholesale?

A. Yes.

(Defendant's Exhibit B marked for identification.)

Q. Calling your attention to Defendant's Exhibit B for identification, look those over and state if those are not a copy of the same bylaws that were sent to you by Mr. Martin in his letter of February 17, 1951, and it would help you I think if your counsel would hand the copy he has to [64] you.

A. Yes, Mr. Laney, they appear to be correct.

Q. So upon your memory thus being refreshed you would say that this Defendant's Exhibit B for identification is a copy of the same bylaws as that of which you received a copy from Mr. Martin in his letter of February 17, 1951?

A. They appear to be.

Mr. Laney: I will offer those in evidence.

(Defendant's Exhibit B marked for identification.)

Q. In looking over those bylaws you gained the information and before you signed this manager's agreement which is dated March 22, 1953, and which is in evidence, Plaintiff's Exhibit 1—before you signed that you knew of the provisions of Article 3 of the bylaws of Southwest Co-Operative Wholesale to the effect that the Board of Directors

Testimony of Ralph W. Held.)

shall have the following powers: "to appoint and remove at pleasure all officers, agents and employees of the corporation, prescribing their duties, fixing their compensation and requiring from them if deemed advisable security for faithful service."

You knew of that general provision there, didn't you? [65]

A. I knew of it in a general way, yes.

Q. And then you also knew of the provision in the bylaws of that company in subdivision 3 of Article 3 as follows: "That the directors shall have the power to appoint a manager who shall hold office at the pleasure and upon the terms and conditions fixed by the Board of Directors who shall exercise such powers and perform such duties as the Board of Directors shall delegate and prescribe."

You knew of that provision in the bylaws, didn't you? A. Yes.

Q. Now, before you took the employment did you also see the bylaws of the other company? Did you also see the bylaws of the United Producers and Consumers?

A. Yes, sir, I think I did.

Q. That was before you signed the contract?

A. Yes.

Q. And did you also see the Articles of Incorporation of both of the companies, each of the companies before you signed the contract?

A. If my memory serves me correctly he sent both copies to me.

(Testimony of Ralph W. Held.)

Q. That is your remembrance, is that he [66] sent the bylaws of the United Producers and Consumers Co-Operative also as well as the bylaws of the Southwest Co-Operative Wholesale?

A. I couldn't positively say, but it seems to me that he did.

Q. Calling your attention to a copy of what purports to be a copy of the bylaws of United Producers and Consumers Co-Operative, first I will ask that they be marked for identification——

(Defendant's Exhibit C marked for identification.)

Mr. Laney: If it please the Court, we can facilitate that by comparing it——

The Court: Do you avow that is a copy?

Mr. Laney: I avow it is a copy.

The Court: All right then, it can be compared later.

Mr. Laney: I will offer in evidence then, Defendant's Exhibit C for identification which I avow to the Court is a true copy of the bylaws of United Producers and Consumers which were in effect at the time of this contract and the negotiations concerning it and during all times involved in this litigation.

Mr. Trask: I have no objection subject to confirming it, I am sure it is all right.

Q. Then you knew before you entered into [67] this contract or claimed contract of the similar provisions in the bylaws of the United Producers

Testimony of Ralph W. Held.)

and Consumers Co-Operative relative to the Board of Directors having the power to hire and discharge employees and officers at their pleasure and having power to appoint a manager who should hold office during their pleasure. You were familiar with those provisions, were you not?

A. I think they also said that they might fix the tenure of office.

Q. Were you familiar with those provisions?

A. Yes.

Q. And before negotiating this contract that was entered upon, you knew that the members of the Board of Directors each were elected for terms of three years, did you not?

A. I wasn't familiar positively with their terms but I knew that they were staggered terms which was customary in co-operative boards where I had worked.

Q. Well you did read the bylaws, the articles of incorporation to the effect they were elected every 3 years, some of them?

A. I read them casually, but I didn't pay particular attention to that at the time.

Q. And you were familiar with the fact, [68] that approximately one-third of the director's terms of office would expire in about a year after you made this contract, weren't you?

A. On 3-year terms that would be an assumption.

(Testimony of Ralph W. Held.)

Q. And about a third would expire somewhat under 2 years and that all of them would be expired something like approximately a year before the end of the first 3-year term of your contract, didn't you?

A. Well, it would seem that part of them should still be serving at the end of the 3-year term.

It would seem that if they were on 3 years that a part of them would be serving at a 3-year term.

Q. Do you know when the last ones were elected?

A. No, I did not.

Q. Didn't you know they were elected sometime in the year '51—that is, in '52?

A. No, I was not aware of that.

Q. You remember, do you not, the meeting of the Board of Directors of both companies of March 6, 1953, at which there was some resolution passed about employing you?

A. No, sir. [69]

Q. What date was that? A. 1952.

Q. 1952, I beg your pardon. But you do remember a meeting of March 6, 1952?

A. Yes, sir.

Q. Now, Mr. Smith was then living, the president of the Board of Directors of each company?

A. Yes, sir.

Q. And you remember that you were present at that meeting for a time and then you and other—some other people who were not members of the Board were excused while your employment was being considered?

A. Yes, sir, that is right.

testimony of Ralph W. Held.)

Q. And you remember that Mrs. McInerney and Mr. Wahmsley were excused and were not present at the time of the actual passing of the resolution about employing you. That is true, is it not?

A. I think it is although I can't positively remember.

Q. Now, when was it that you saw Mr. Smith after the close of the meeting? Did you see him right after?

A. I think it was immediately after the close of the meeting.

Q. And then you recall that you and he [70] stepped into Mrs. McInerney's office.

A. I think I was waiting in there for the meeting to close.

Q. Well, at any rate you and Mr. Smith were present in Mrs. McInerney's office there right shortly after this meeting of March 6, 1953?

A. I think that is right.

Q. Now, you remember that Mr. Smith at that time handed Mrs. McInerney something that he said was the resolution that the Board had just passed about employing you. Do you remember that?

A. I remember he handed her something, but I didn't identify it to me.

Q. He didn't say that it was about employing you or anything about that?

A. Not that I specifically recall.

Q. And so then he did say that the Board had

(Testimony of Ralph W. Held.)

passed some resolution authorizing your employment didn't he?

A. Well, I couldn't positively say whether he did at that particular time or not. He told me sometime after the meeting broke up that they had had but whether that was the exact time that he did it I couldn't say at this time.

Q. Well, did you make any inquiry about [71] the terms of this resolution authorizing your employment?

A. No, sir, Mr. Smith merely told me that he had been authorized by the Board of Directors to employ me.

Q. Was anyone else present at that time?

A. No, that was while we were on the way uptown we were talking about it, he took me down back to the hotel.

Q. Did you ever at any time ask, before you signed this contract, to see the minutes that authorized your employment?

A. No, sir, I did not.

Q. You didn't make any inquiry about the terms of those minutes at all?

A. No, sir.

Q. You didn't make any inquiry as to what the scope of the agency of Mr. Smith was at all in the way of employing you?

A. Mr. Smith told me that he had been authorized and I had just met with the entire Board and I assumed that was the case.

Q. But you didn't make any inquiry about the terms of the authorization?

A. No, sir.

Q. You did know, though, that Mr. Smith [72]

Testimony of Ralph W. Held.)

as purporting to act as agent for the company employ you? A. Yes, sir.

Q. Then this contract was made up rather late the afternoon of the next day, March 7, was it?

A. That is right.

Q. Now, you recall that you told Mr. Smith that you intended to leave to go back to the middle-west that evening? A. That is right.

Q. And you and Mr. Smith came into Mrs. McInerney's office to dictate the contract, didn't you? A. Yes, sir.

Q. And that was at about 5:15 in the afternoon, wasn't it?

A. It was around 5:00 o'clock. I don't recall the exact time.

Q. And you knew that the office closed at about that time? A. That is right.

Q. And you stated that you had not been accustomed to have written contracts in your employment with co-operatives, is that correct?

A. That is right. [73]

Q. But you did have along some kind of a form contract document, did you?

A. I had the contract that the member companies of the Iowa Farm Service Company used for the employment of local managers. I was at that time manager of the Iowa Farm Service Company.

Q. Well, were you manager or were you director of procurement?

A. Actually I was director of procurement at

(Testimony of Ralph W. Held.)

that time. The company had been reorganized in the last year.

Q. You had been manager?

A. Yes, that is right.

Q. And did they get another manager?

A. They combined 4 companies under one general management.

Q. So they got another manager for this company? A. That is right.

Q. You were director of procurement?

A. Yes.

Q. Now, to refresh your memory, don't you recall that you produced there in the presence of Mrs. McInerney and Mr. Smith a form of contract which you said some lawyer in the east had drawn up or in the [74] middlewest?

A. I did have this contract, but I made no remark about any lawyer drawing it up. I don't know who drew it up. It was one that we had had in general use for the last 4 or 5 years.

Q. Now, to refresh your memory, don't you recall that the form of contract that you produced there was a one-page document?

A. No, sir, it is not.

Q. Well, you did dictate to Mrs. McInerney from this contract certain——

A. Certain paragraphs.

Q. Certain paragraphs and she embodied them in this contract that has now been introduced as Plaintiff's Exhibit 1? A. That is right.

Q. And isn't it a fact, please, Mr. Held, that

(Testimony of Ralph W. Held.)

Q. The only thing that was changed as you dictated is to Mrs. McInerney was the names of the parties and the compensation and the percentages?

A. The paragraphs are not in the same order as they appeared in the contract from which we dictated it.

Q. Have you a copy of that contract that you produced there? [75]

A. Yes, I have.

Q. Is it in the possession of your attorney?

A. Yes, sir.

(Defendant's Exhibit D marked for identification.)

Q. Calling your attention to Defendant's D for identification, whose handwriting are those pencilled numbers, 2 number 3 and 4?

A. Those are mine.

Q. When did you put those there?

A. While Mr. Smith and I were talking about

Q. So when you assumed that Mr. Smith had the right to employ you, that was an assumption that you just gathered from what Mr. Smith told you?

A. Yes, sir, and I had just met with the entire board to talk with them about that very matter.

Q. The entire Board or any member of the board—did they at any time tell you that they could give you power absolute to hire and fire everyone there without cause, did they?

(Testimony of Ralph W. Held.)

Mr. Trask: Object to the question as argumentative. The contract speaks for itself.

Mr. Laney: I withdraw it.

Q. Did any member of the Board tell you that they were willing to make a contract for 3 [76] years including the provision that you should have the right to employ and discharge all persons needed to carry on the affairs of the business?

A. Yes, sir.

Q. The members of the Board in that meeting said that?

A. Mr. Smith told me that. When we were discussing it he agreed that that was proper to put in the contract.

Q. Mr. Smith said that, but the Board didn't tell you that, did they? A. No, sir.

Q. No member of the Board. A. No, sir.

Q. When this says that for the second and third years of the agreement your compensation should be at the rate of \$10,000 per annum plus 2% of the net income of the company, did you and Mr. Smith agree on those words?

A. Yes, sir, I think we did.

Q. You dictated that, did you?

A. But he was sitting right there and we discussed it prior to——

Q. You did dictate those words?

A. Yes. [77]

Q. Now, when you came here you started to work under this purported contract which is Plaintiff's Exhibit 1 there on April 1 of 1952?

Testimony of Ralph W. Held.)

A. Yes, sir.

Q. You knew, did you not, that the signed copy of the contract that you had signed had arrived there shortly after Mr. Smith's death?

A. No, sir, I did not know that it arrived after his death.

Q. When did you send it?

A. It was mailed, I believe, on the 22nd of March.

Q. And his death was on the 25th of March, was it not?

A. I believe that is right, but I am not sure of the exact date.

Q. Now, you mailed this to his residence in Glendale, did you not?

A. I think that is right, yes, sir.

Q. Why didn't you mail it to the company?

A. I think Mr. Smith requested that I mail it to him in the telephone conversation that we had when he called me on the morning of the 21st.

Q. Well, now after the meeting of March 6, 1952, at which the two boards of directors made the [78] resolution about employing you—after that and between that time and when Mr. Smith assigned this agreement on March 7, 1952, did you discuss the matter with Mr. Wahmsley, the auditor?

A. Yes, sir.

Q. Between those two times, between the passage of the resolution on March 6 and the signing of the contract by Mr. Smith on March 7 you didn't discuss that?

A. Yes, sir, I did.

(Testimony of Ralph W. Held.)

Q. Where did you discuss it?

A. At the Arizona Club on the evening of March 6.

Q. And at the Arizona Club Mr. Wahmsley—you did not discuss with Mr. Wahmsley anything about you having power to hire and fire regardless of cause everybody in the company, did you?

A. I don't think regardless of cause, no, but I think we did discuss some such provision in the contract.

Q. That is if there was cause?

A. That is right.

Q. Then you did not discuss with Mr. Wahmsley the matter of your having a full 3 years regardless of whether you were found satisfactory, [79] did you?

A. We discussed 3-year term.

Q. And the only thing was if your services were found satisfactory, wasn't it, that you discussed with Mr. Wamsley?

A. I don't think that was ever discussed at all, that particular angle of it.

Q. Mr. Wahmsley did not agree ever in your presence to the terms of this manager's agreement of Plaintiff's Exhibit 1, did he?

A. No, nor did he disagree to it.

Q. Do you know of his having any knowledge that he was delegated the job of formulating the terms of this contract with Mr. Smith? Do you know that he had any knowledge of that?

A. No, I do not.

Testimony of Ralph W. Held.)

Q. Did you ever after you came to work here on April 1 discuss with any of the members of the Board of Directors the fact that there was a contract that you claimed under that was signed by Mr. Smith alone? A. No, sir, I didn't.

Q. And did you discuss that subject with Mr. Wahmsley?

A. No, sir, I assumed that was settled when we signed the contract. [80]

Q. And then you say the first intimation that you heard that the contract was questioned or the legality of it was in that telegram that was sent to you by Mr. Essley under date of May 27, which we see is Plaintiff's Exhibit 2 in evidence.

A. Yes, sir.

Q. And Mr. Essley was the new president that had been elected after Mr. Smith had died?

A. That is right.

Q. Now, between the time when the contract was signed by Mr. Smith on March 7 of 1952 and the time of sending this wire, this telegram, Plaintiff's Exhibit 2 of May 27, between those dates did you discuss with any of the members of the Board of Directors the matter of how your contract was signed or who had signed it?

A. No, I do not recall that I did.

Q. And did you discuss with any of the members of the Board at any time prior to the time when you were notified that they considered your contract illegal in substance and any employment terminated there on June 20 of 1952?

(Testimony of Ralph W. Held.)

Mr. Trask: I don't believe I understand your question. Are you referring to the telegram or the meeting? [81]

Mr. Laney: I will reframe it.

Q. Then between the date of the telegram to you by Mr. Essley of May 27, 1952, and the date of June 20, 1952, when you were notified in substance that they considered you never legally employed and that you hadn't fulfilled the terms of the contract between those two times, did you ever discuss with any member of the Board who had signed your contract? A. Yes, sir, I did.

Q. Whom did you discuss it with?

A. Well, I discussed it with several of them. I don't know that I can name all of them particularly.

Q. And when was that?

A. I discussed it with Mr. Essley briefly when I went out to visit him at his farm following that.

Q. And that was about what date?

A. It was early in June, I don't recall the date. It was prior to June 9. I discussed it also with Mr. Knox and Mr. Fisher when I called on them following the receipt of that wire in Des Moines. I believe I also mentioned it once to Jack Fleck.

Q. But that was all in June? A. Yes.

Q. And it was after you had received a [82] notification of May 27, of course? A. Yes, sir.

Q. And Mr. Essley, when you talked with him, told you in substance that it wasn't considered that you had been legally employed because Mr. Smith wasn't authorized to make all these terms in this

Testimony of Ralph W. Held.)

contract and that he didn't refer it to Mr. Wahmsy. He told you that in substance, did he?

A. I don't remember what his conversation was, but he did mention that there was some disagreement about it and they had called a board meeting for June 9 and that they would discuss it at that time.

Q. Well, now when you first came to work there, you say, on April 1, 1952, isn't it a fact that you spent very little time around the plant or in the office, well for the entire time the entire 21½ months?

A. I was there a good share of the time, but I

Q. Well, the first week how much were you also out in the territory a great deal.

Q. Well, the first week how much were you there?

A. I think I was there all the time for the first week except when I went out to call on Mrs. Walter Smith at Glendale. I think I made that call the first week I was there to express my sympathy and I [83] went uptown a little while one afternoon to see about changing license plates on my car, but otherwise I think I was in the office all the time.

Q. The first week that you were there after you came there on April 1—well to be exact, on April 7, you went over to see members of the South-west Co-Operative Wholesale in California and elsewhere, didn't you? A. That is right.

Q. And before going there you told Mrs. Mcnerney, did you not, that you intended to go over and try and get their business—to have them do

(Testimony of Ralph W. Held.)

business with a company comparable to the business that was done by United Producers and Consumers?

A. I wanted to find out what the exact situation was with them since they were members of the Wholesale.

Q. And you were told that those were companies in which it was not feasible for them to buy from Southwest Co-Operative Wholesale, weren't you?

A. I wanted to know first hand whether it was feasible or not.

Q. And Mrs. McInerney explained to you why, that they could not buy any quantity more, didn't she?

A. No, I don't recall that she did. [84]

Q. Well, after you got back you admitted to her that she was correct, that there was no chance to increase that business there because they had definite other commitments or else were not in the market, didn't you?

A. I found out that that was very largely true because of the freight rates and so forth.

Q. And then you recall that the next week, that is the week of April 14, you were out of the office practically all of the time stating for part of that time that you were calling on members of the Board of Directors?

A. Yes, sir, I did call on most of the members of the Board.

Q. And you were out of the office practically all that week? A. That is right, sir.

Testimony of Ralph W. Held.)

Q. And then by the way, before going to call see those other co-operatives why you didn't familiarize yourself with what the company here had to sell or what the price list was or the terms, anything of that sort, did you?

A. I knew what the company's business was, yes, sir.

Q. But you didn't familiarize yourself with the price list so you could quote anything to them or what you had to sell? [85]

A. I was merely making a survey to find out what the situation was with respect to their membership.

Q. I will ask you if it isn't a fact that whenever you did come to the place of business there during the month of April you would be there generally only a matter of a half hour in the morning to an hour?

Mr. Trask: May we have the time?

Q. During the entire month of April whenever you came there, isn't that true?

A. I am not sure that that time is correct and there was there very often in the evenings when the store closed because I remember being there when the door was being locked and people were being turned out of the store.

Q. Well, now isn't it a fact that there were some eight heads of departments or more in these companies? A. Something like that.

Q. And don't you know it to be a fact that during the entire time you were there that those

(Testimony of Ralph W. Held.)

heads of departments could seldom find you at all around there to confer with you?

Mr. Trask: Object to the form of the question. It is impossible for this witness to know [86] what the others could do.

The Court: Yes.

Q. Then I will ask you if it isn't a fact that from May 7 through May 23 you came there only on an average of about an hour a day in the morning to the plant or to your office?

Mr. Trask: What dates are those?

Mr. Laney: May 7 to May 23, 1952.

A. I didn't keep any calendar on that, but I know that during that period I was out of the office and we had some demonstrations in the field that I attended and we had some meetings set up that I attended. I made several trips with various members of the staff.

Q. You didn't familiarize yourself with what the business was of these various departments, did you?

A. When I was out in the field with the sales manager, for example, that is what I was doing.

Q. Then there was a Board meeting which you attended on or about May 23 of 1952, wasn't there?

A. It was somewhere along in there.

Q. And then immediately after that you left for the east, as you say, to return to your family?

A. That is right. [87]

Q. And you did not mention to the Board that you were going, did you?

(Testimony of Ralph W. Held.)

A. I had mentioned that several times to various members of the Board that the latter part of May I planned to go back after my family and that had been my understanding with Mr. Smith prior to drawing up the contract.

Q. To whom did you mention that you were going on the 23rd—that you were going at that time?

A. Well, I recall specifically that one member of the Board asked me that day—if I can think of his name. He was here a little bit ago. Emil Rovey was. He asked me that day when I was going back after my family and I told him that I planned to go that evening.

Q. And you did not mention it to the president of the company, Mr. Essley, that you were going all, did you?

A. I don't think I did that particular day.

Q. Well you didn't at all, did you?

A. I don't remember whether that had come out of previous conversations with Mr. Essley or not. I had mentioned it to several members of the Board that I [88] would plan to do that.

Q. Haven't you learned if Mr. Essley wanted to find you and couldn't find you and then shortly thereafter that, being May 22, he sent you this wire?

Mr. Trask: I object to the form of the question to what Mr. Essley could or could not do. There is no way for this witness to know.

Q. Do you recall the wire sent shortly after that?

A. I got the wire in the morning.

(Testimony of Ralph W. Held.)

Q. Then after you went east that was about May 23?

A. If that was the date of the Board meeting. I left that evening which was a Friday night, I believe.

Q. And then you returned to the office on June 2? A. On a Monday morning.

Q. That was approximately that time?

A. About that time.

Q. Isn't it a fact you spent only about an hour a day at the maximum there around the plant or at the office?

A. Well, immediately after that I contacted Dana Fisher at Blythe, California; that was an entire day's journey over there and back. I contacted Mr. Essley and Mr. Rovey the same day. Another day I was down to see Mr. Knox and I believe there was another day that [89] I stopped in to see Mr. Clek.

Q. Then you state that there was this board meeting of June 9 and after that there were certain discussions between you and a committee?

A. Yes, sir.

Q. But it did not result in any settlement?

A. No, sir.

Q. In those companies there were at the time that you were acting as manager approximately 135 employees, were there not?

A. Something like that.

Q. And to be exact there were twelve heads of departments, were there not?

Testimony of Ralph W. Held.)

A. I don't recall the exact number.

Q. Well, now this United Producers and Consumers Wholesale was doing a business of several million dollars a year, wasn't it? A. Yes, sir.

Q. One of the leading men there was Joe Huron, wasn't it?

A. He was in charge of the fertilizer plant and insecticide plant.

Q. And in charge of construction and maintenance? A. Yes, sir.

Q. And transportation in charge of keeping [90] the trucks and motor vehicles in shape?

A. I think that is right.

Q. And did you ever familiarize yourself with what he was doing?

A. I was down at the plant several times.

Q. Which plant?

A. To the insecticide plant.

Q. How many times?

A. Oh, a dozen or so.

Q. And didn't you learn that he frequently came try to find you and see you and consult with you and couldn't find you in? A. No, I did not.

Q. Well, did you ever advise with him as to what to do or find out whether he was doing it well or not?

A. Yes, I talked to him on several occasions.

Q. What did you talk about?

A. The equipment, the new equipment that he was getting in and he assured me that the material was arriving on schedule and that he would get

(Testimony of Ralph W. Held.)

the plant in production in time to start producing the insecticides for that summer's work.

Q. He was installing machinery, a lot of machinery at the insecticide plant at that time, wasn't [91] he?

A. That is what I just said, yes, sir.

Q. Well, you didn't find anything about that, did you?

A. I was not an engineer and I did attempt to try to tell him how to install it, sir.

Q. Then Everett Barber, he was manager of the lumber yard, wasn't he? A. That is right.

Q. And you didn't learn anything about the working of that or the business of that in the 21½ months you were there, did you?

A. Mr. Huber and I discussed the purchase of lumber at different times. We looked over the stock out there. I was in Mr. Basher's office two or three times during that period, but I didn't attempt to perform Mr. Basher's job for him.

Q. And you didn't attempt in any way to manage that part of the business, did you?

A. I didn't try to do his work if that is what you are referring to.

Q. You didn't attempt to manager it, did you? You didn't do anything about it, did you?

Mr. Trask: If the Court please, I object to the question. I don't know what counsel is [92] getting at about managing someone else's work.

The Court: I don't see it.

Testimony of Ralph W. Held.)

Q. Did you learn whether Everett Basher was doing a good job or a bad job or not?

A. Well, the records showed that lumber sales were increasing and I would assume from that that he was doing a good job and that was the way I attempted to manage the business.

Q. You attempted to manage it just by looking at whatever records they gave you.

A. I think that is the way it should be handled.

Q. Did you ever give him any directions of any sort?

A. Not too specifically. He had been in that job for a number of years before I came here.

Q. Mr. Bill Eden was head of the hardware department, wasn't he? A. That is right.

Q. And that was a business that did a large business, didn't it? A. Yes, sir.

Q. And you didn't look into that or become familiar with it at all, did you?

A. Yes, I knew in a general way what Mr. [93] Eden's problems were and what he was getting done.

Q. Did you ever talk with Bill Eden or ask him anything about the business or what he was doing?

A. Yes, sir.

Q. When?

A. Several times. He sat in on a couple of staff meetings that we had. I recall a couple of times that he came back and specifically asked me about a couple of tire adjustments.

Q. You recall there was one meeting at which

(Testimony of Ralph W. Held.)

Eden was present, isn't that true, and that you asked him if he had any problems?

A. As a general thing, yes, I raised that question with each one of the department heads if they had any problems that they would like to discuss.

Q. And then he told you that he had hundreds of them and you didn't make any further inquiries, isn't that right? A. No.

Mr. Trask: May we have the time and place of that meeting, Mr. Laney, please.

Mr. Laney: Well, wasn't that about the middle of May didn't that transpire, 1952?

The Witness: I don't remember, sir. [94]

Q. You knew Harvey Sims? A. Yes, sir.

Q. What was his job?

A. He operated the elevator and feed mill.

Q. He was supervisor of the feed and seed and supervisor of labor at the insecticide and fertilizer plants, wasn't he? A. That is right.

Q. And he also supervised the unloading crews and the dock men and truck drivers, didn't he?

A. That is right.

Q. Isn't it a fact that you only saw him twice in the 2½ months that you were there?

A. No, that is not true.

Q. Isn't it a fact that about the latter part of May you talked with Harvey Sims and the extent of your conversation was about 5 minutes?

A. I don't recall that conversation that you have reference to.

Q. Isn't it a fact that about that time you told

(Testimony of Ralph W. Held.)

Q. Is it true that the way you managed a business was just to look at the reports?

A. I don't recall that conversation, sir.

Q. And isn't it a fact that the only other time that you talked with Harvey Sims was when you talked [95] about taking one man from his department and giving that man to Mr. Holmes, the field man. Do you remember that?

A. I remember that discussion, but I talked to him at other times also.

Q. Isn't it a fact that you were there only about 10 minutes at that time?

A. I think that is probably as long as we talked about that particular man.

Q. Isn't it a fact that the only time that you met Harvey Sims was two times, once about 5 minutes and once about 10 minutes during the entire 1½ months?

A. No, I saw him around the plant many times.

Q. Did you ever try to find out from him any of the problems of the business, discuss them with him?

A. No, I didn't particularly discuss any of those things in specific detail with him.

Q. Then you know Paul Hunt?

A. Yes, sir.

Q. What was his job?

A. He was manager of the furniture store.

Q. I will ask you if it isn't a fact [96] that the only time that you went into the furniture

(Testimony of Ralph W. Held.)

store was just when you wanted to buy some furniture one time and talked about that?

A. No, that is not true.

Q. You do recall that about May 12 you came to the furniture store and introduced yourself to Mr. Hunt and inquired about your buying some furniture?

A. No, I didn't introduce myself to him on May 12. I met him the first week I was there in company with Ernie Hubert.

Q. Was it about May 12 that you talked with him about buying furniture?

A. I don't remember. I had been in the store many times before then.

Q. Isn't it a fact that you only saw Mr. Hunt, the manager of the furniture business, about twice during the 2½ months that you were there?

A. No, sir, I saw him many many times more than that, sometimes when I was in the store he was busy with a customer and I didn't interrupt or didn't talk to him, but I was through there several times.

Q. I will ask you if it isn't a fact that you never at any time made any inquiry from Paul Hunt, the manager of that department, about the business or anything about the business or the sales or [97] the management there of that business?

A. I had discussed it more in detail with Ernie Hubert since he was presented to me as being in general supervision over the furniture store and Ernie and I talked about it a great many times.

Testimony of Ralph H. Held.)

In fact Mr. Huber had discussed with me the matter of closing the furniture store and liquidating the inventory.

Q. Well as a matter of fact Paul Hunt was the head of the furniture store, wasn't he?

A. But Mr. Huber was over him.

Q. Who represented that to you?

A. Mrs. McInerney.

Q. What was Mr. Huber's job?

A. Well, the sheet that she gave me the first day I was there listed Mr. Huber as being in general supervision.

Q. Of what?

A. Of the hardware store and the furniture store, the lumber yard, those three in particular. I don't know whether that was supposed to include others or not. It didn't specifically say.

Q. Mr. Ivan Stollzfus was the office manager of the feed and seed, insecticide and fertilizer there and manager of the sales warehouse and sales office? [98]

A. That is right

Q. I will ask you isn't it a fact that you never at any time had any conference with him or did anything about the management of his department?

A. I have, and sat in on a couple of staff meetings, I believe, with the other department heads and I occasionally would ask him how things were going and he assured me that things were going all right.

Q. I will ask you if it isn't a fact that the only thing you ever discussed with Ivan Stollzfus was

(Testimony of Ralph W. Held.)

that you suggested something about grading the grounds there?

A. No, I don't think I discussed that with Ivan Stollzfus.

Q. Now, you do recall that you learned of many people coming and wanting to see you, both employees and others when you weren't there?

A. No, sir, I didn't.

Q. Well, isn't it a fact that you would frequently go away without telling anyone where you were?

A. No, I don't believe so. I think either my secretary or Mr. Huber or one of the girls on the telephone switchboard practically always knew where I [99] was going.

Q. Isn't the girl on the switchboard Wanda Shone?

A. Well, there were a great many different girls on that switchboard during the period I was there.

Q. Isn't it a fact that you would frequently leave and be gone all the rest of the day without letting her know where you were?

A. If she didn't know, Mr. Huber or Miss Alexander, my secretary, knew at that particular time.

Q. Where is Miss Alexander now?

A. I do not know, sir.

Q. You say she was your secretary?

A. Yes, sir.

Q. And you say when you would leave there you would tell her where you were going?

(Testimony of Ralph W. Held.)

A. There was usually one of those three people that knew where I was at.

Q. Now, Mr. Held, I understood you to say that you first came out here—that was in what month, please? A. April.

Q. No, I mean you first came here in what month? A. In January. [100]

Q. And I understood you to say that you determined that they had management here and you were not interested in the matter until someone called on you later from the company?

A. That is right. That is I was not definitely interested in it.

Q. Well, don't you recall that you did write to Walter Smith on February 14 of 1952, about the matter? A. Yes, sir.

(Defendant's Exhibit E marked for identification.)

Q. Calling your attention to Defendant's E for identification, this is a letter that you wrote to Mr. Smith about the date it bears? February 14, 1952?

A. Yes, sir.

Q. You do recall then that after you had gone you came back, talking with Mr. Smith about it in this letter, didn't you? A. Yes, sir.

Q. Now, when you came out here and started work, as you say, on April 1, I believe you said you attended the meeting, board meeting of April 3, 1952. did you? A. Yes, sir. [101]

(Testimony of Ralph W. Held.)

Q. And you were present during that meeting, weren't you? A. Yes, sir.

Q. And you recall that at that meeting the minutes of the meeting of March 6 in which Smith and Wahmsley were authorized to employ you and work out terms of employment were read and approved in that meeting in your presence, isn't that true?

A. I think that is right.

Q. And so you knew within three days after you had come out here to work of the fact that the authorization by the board was for Wahmsley and Smith both to work out the terms of your employment, didn't you?

A. Yes, I did and I had discussed them with both of them.

Q. And Wahmsley had never agreed to this contract at all, had he?

A. I had discussed most of the provisions of that with him, but nobody had ever said that he was expected to sign it or that anything further was necessary as far as I was concerned.

Q. Now, will you answer my question. He never had agreed to this contract that is Plaintiff's Exhibit 1 in evidence? [102]

Mr. Trask: Object to the form of the question. There is no way this witness would know unless there had been some discussion with him. He wouldn't know what was in Mr. Wahmsley's mind.

Q. You never at any time discussed the terms of that contract or showed that contract to Mr. Wahmsley, did you?

testimony of Ralph W. Held.)

A. I discussed the terms of it with him, but usually I didn't show the contract to him because Mr. Smith gave me the two copies to take back.

Q. Well, you discussed with him—did you ever discuss with him that you should have the power to hire and fire without regard to cause, anyone in the company?

A. I think we discussed that, but my assumption was that it would be with cause whenever that authority would be used.

Q. He never did agree to that, did he?

A. I don't recall whether he did or didn't.

Q. He never did agree on a percentage of this profits, did he?

Mr. Trask: Same objection. There is no way this witness would know.

Q. He never did in your presence, did he?

A. He discussed a percentage of net with Mr. [103]

Q. But he never did agree to 2% of net profits, did he?

Mr. Trask: Same objection, if the Court please.

Q. In your presence.

The Court: Did you ever discuss this matter of profits with him?

The Witness: Yes, sir, we did.

Q. Yes, but he never did agree to it nor was any percentage arrived at or even tentatively agreed between you and Wahmsley, was there?

A. I don't know whether he agreed to it or not. I did discuss it.

(Testimony of Ralph W. Held.)

Q. But it never was agreed tentatively even between you and Wahmsley?

A. He didn't disagree.

Mr. Trask: Objection.

The Court: Yes.

Q. Well, now you recall that shortly after—you say your first employment after the notification of June 20 was on September 1 of 1953?

A. That is right, sir.

Q. And I will ask you if it isn't a fact that under date of June 19, 1952—I said your first employment was June 1, 1953—that was a mistake, it was June 1, 1952, was it not? [104]

A. September 1, 1952.

Q. I am sorry, September 1, 1952. Now, isn't it a fact, though, that as early as June 19 of 1952 you had an opportunity to go back to work with the consumer co-operative association there at Kansas City?

A. Well, I believe the copy of the letter which you have photostated there was forwarded to me by Mr. Trask on the 26th of July. That was a letter that was addressed and Mr. Trask stated that the letter had been opened before being forwarded to him, but he was sending it on to me and his letter sending it to me was dated July 26.

(Defendant's Exhibit F marked for identification.)

Q. I show you Defendant's F for identification addressed to you as manager of Southwest Co-

(Testimony of Ralph W. Held.)

operative, and ask you if that isn't a photostatic copy of the letter from Consumers Co-Operative Association which was sent you at about that time?

A. Yes, sir, this letter reached me sometime after July 26.

Q. And you could have gone to work for them at that time, could you not?

A. I don't think prior to the time that I did. This is the association with which I am working actually except that I am on the payroll of one of their [105] subsidiaries.

Q. Well you went on a trip to California and found various places before you even tried to go to work, didn't you?

A. I was gone about 10 days before I got back to Iowa.

Q. You went to California, was it?

A. Yes, I went there to pick up my family.

Q. And then when did you go to Iowa?

A. About the 1st of July early part of July, I don't remember the exact date.

Q. And then July and August, during those months you could have gone to work, couldn't you, for this company?

A. That offer didn't reach me until the 26th of July.

Q. During all that time you could have gone to work for them, could you?

A. No, I called on them almost immediately to negotiate on the thing and the earliest date that

(Testimony of Ralph W. Held.)

I could have gone to work for them was September 1.

Q. You knew Mr. Harry Purdy there who was a bookkeeper and is now office manager of the company, did you? A. Yes, sir. [106]

Q. You didn't take up matters with him as the manager was accustomed to do there, did you?

A. Well, at the time I was there Mr. Purdy wasn't office manager and I did discuss the things with the man who was office manager.

Q. What did you discuss with him?

A. Various reports that I wanted on the business.

Q. And who was that? A. James Leonard.

Q. And is he there now? A. I think not.

Q. His name was James what?

A. Leonard.

Mr. Laney: That is all.

Redirect Examination

By Mr. Trask:

Q. Counsel has inquired about what your activities were from the time that you started to work in April until May 27 when you were informed by Mr. Essley that your contract was in question. During that period of time or during any of the period of time that you were in Phoenix did you ever have any other business interests of your own to serve other than getting a house for your family to live in? [107] A. No, I did not.

Q. Did you have any relatives here or personal

(Testimony of Ralph W. Held.)

Interests of any kind that would require your time away from the business? A. No, sir.

Q. Did you in fact spend any of your time during the working days other than upon company business whether it was inside the office or outside the office?

A. I spent a little time in April I would say, probably a couple or three days altogether actually negotiating the purchase of a house and I had discussed that prior with Mr. Smith and he told me that he felt that would be all right to take a little time to find a place to live out here.

Q. Other than that did you devote any of your time during the ordinary working hours to other than the affairs of the company by which you were employed? A. No, sir.

Q. Mr. Laney has suggested that you didn't spend all of your time inside the office. What were you doing when you were not inside the office?

A. Well, I can recall a couple of cotton-chopper demonstrations that I attended.

Q. How much time did they take?

A. These were a half a day each, two of them. [108] I spent two days at Casa Grande in company with Herb Holmes, who was sales manager and we called on several big growers down there and in addition to that we selected the field for one cotton-chopper demonstration that we held in that area.

On another occasion I spent two days with Herb Holmes in the Safford area. I recall meeting Mr.

(Testimony of Ralph W. Held.)

Lehigh Palmer in a cotton field one evening about 7:00 south of Mesa.

Q. Without attempting to account for every moment of your time, did you devote any time to your personal interests other than the business interest that the company had employed you to perform?

A. No, sir, I had no personal interests here.

Mr. Trask: That is all.

Recross-Examination

By Mr. Laney:

Q. Well, you went down to Yuma, didn't you?

Mr. Trask: What time?

A. We came through Yuma on our way back from Safford.

Q. You stayed in Yuma a day?

A. No, sir.

Q. There was no customer in Yuma you [109] were calling on, was there?

A. I beg your pardon, sir, I misunderstood the town. Yes, I came through Yuma on my way back from having called on the San Diego Poultry Co-op.

Q. There was no Co-op there in Yuma that was any customer at all, was there?

A. There is a Co-op there, but it wasn't a customer, but the company did have a dealer outlet there listed under the name of Grubbs Hatchery or some such name.

Q. Isn't it a fact that you went to Yuma there

Testimony of Ralph W. Held.)

and that you were endeavoring to buy a farm there? A. No, sir.

Q. You told Mrs. McInerney and Mr. Wahmsley that you were going to buy a farm there, were looking into it, didn't you?

A. I never looked into the matter at all. I came through Yuma on my way back from San Diego, but I merely passed through there.

Q. You told them you stayed there a day?

A. No, I stayed overnight.

Q. You told them you were endeavoring to buy a farm there?

A. No, I did not.

Q. Nothing to that effect? [110]

A. No, sir.

Mr. Laney: That is all.

Redirect Examination

by Mr. Trask:

Q. Were you endeavoring to buy a farm in Yuma? A. No, sir.

Q. Did you buy a farm in Yuma?

A. No, sir.

Q. Did you negotiate with anybody regarding a farm?

A. I never once talked to anybody about it except that I do recall one time Louie had mentioned there was a big area, Mr. Wahmsley mentioned there was a big area opening up down in the Yuma area, but I never investigated any further, never talked to anybody in the real estate business

(Testimony of Ralph W. Held.)

and Mr. Wahmsley was the only person that I recollect ever mentioned it to me.

Mr. Trask: That is all.

ORVILLE KNOX

called as a witness by and on behalf of Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Trask: [111]

Q. Would you state your name, please?

A. Orville Knox, Chandler.

Q. What is your occupation? A. Farmer.

Q. Between December, 1951, and January, 1952—down to after June 20 of 1952, did you hold any position with either the United Producers Consumers or the Southwest Wholesale Co-Op?

A. Yes, I was the director of the wholesale Co-Op.

Q. And were you any officer or director on the United Producers? A. No.

Q. What office did you hold, if any, with the Southwest Wholesale?

A. I was the secretary of Southwest Wholesale.

Q. That was during that entire period of time?

A. Yes, sir.

Q. How long had you been on the board of the Southwest Wholesale?

A. I don't know when I went on, but I have been on possibly eight years, something like that. I don't know the exact time I went on. [112]

Testimony of Orville Knox.)

Q. You are appearing here under subpoena from me?
A. Yes, sir.

Q. As a matter of fact weren't you one of the original incorporators of the Southwest Co-Operative Wholesale?

A. It seems to me like I went on possibly just a little bit after. I am not sure. It was in process of being incorporated. I thought maybe I was a little bit behind that.

Q. Do you have the articles of incorporation of the Southwest Co-Operative Wholesale, Mr. Laney? May I see those?

Mr. Laney: Yes. I have certified copies from the recorder's office. There are two that were in effect.

Q. Just for the purpose of refreshing your recollection, Mr. Knox, let me show you apparently a certified copy that counsel has just handed me of the original articles of incorporation of the Southwest Co-Operative Wholesale. Under Article 1, I believe, the incorporators are listed. Are you the Orville Knox that is listed there?
A. Yes, sir.

Q. Does that refresh your recollection so [113] that you now recall you were one of the incorporators and have been on the Board since that time?

A. It must be from that.

Q. And in addition to the incorporator you became a member of the Board of Directors at the same time, did you not, Mr. Knox?
A. Yes.

Q. You have been then a member of the Board of Directors of the Southwest Co-Operative Whole-

(Testimony of Orville Knox.)

sale ever since its incorporation? A. Yes, sir.

Q. That was in approximately 1944 and the other incorporators were Mr. W. L. Smith. Do you recall his name as one of the incorporators?

A. Yes, sir.

Q. That is the same W. L. Smith that Mr. Held testified to employed him and died? A. Yes.

Q. He was on the Board of Directors ever since its incorporation in 1944? A. Yes, sir.

Q. And Mr. W. S. Dorman was one of the incorporators and also on the Board continuously?

A. Yes, sir.

Q. Mr. I. F. Collier was one of the [114] incorporators and on the Board continuously?

A. Yes, sir.

Q. Mr. D. O. Essley was one of the incorporators and on the Board continuously? A. Yes.

Q. You yourself and Mr. C. M. Martin was until recently? A. Yes.

Q. So as a matter of fact although the term of the Board of Directors of that corporation is three years, practically all the directors have been on there ever since it has been organized since 1944, have they not? A. That would be right.

Q. And they have been re-elected for successive terms at all times since. Mr. Smith was only retired as a result of his death? A. Yes, sir.

Q. So there is not much change on the Board of Directors of the Southwest Co-Operative Wholesale, is there, Mr. Knox?

Testimony of Orville Knox.)

A. No, I think possibly there was one other path in there that required a new director.

Q. Other than that, the directors have been continuously re-elected for successive 3-year [115] terms? A. Yes, sir.

Q. The directors of the United Producers and Consumers, do they hold their meetings at about the same time as the Southwest Wholesale?

A. Usually immediately after the Wholesale meeting.

Q. So throughout the years you have had an opportunity to observe who the directors of the United Producers and Consumers as well as the Southwest Wholesale have been? A. Yes, sir.

Q. What is the situation with respect to United? Have their directors been substantially the same throughout the years?

A. Stayed about the same.

Q. Elected for successive 3-year terms?

A. Yes, sir.

Q. When did you first meet Mr. Knox?

A. It would be the first part of March at a meeting we had in March. I didn't meet him on my first trip here.

Q. You met him at a Board of Directors meeting of the Southwest Co-Operative? A. Yes.

Q. If the evidence shows that meeting took [116] place on or about March 6 would that be approximately the date?

A. I think that would be about right.

(Testimony of Orville Knox.)

Q. How was Mr. Held introduced to you at that time? When and where?

A. Just outside of the meeting place before the meeting. I came rather late. Just before the meeting and I was introduced by Mr. Rovey, one of our directors, as the new man that we were attempting to hire.

Q. Mr. Rovey, one of the directors introduced Mr. Held to you as the new man they were attempting to hire? A. Yes.

Q. By "we" were attempting to hire, you understood that to mean what organization?

A. Well, our two organizations, the wholesale and retail co-operatives.

Q. As a matter of fact, the Southwest Wholesale is the wholesale part of the organization and the United Producers and Consumers is the retail part of the organization? A. Yes, sir.

Q. As a matter of fact, during the years that you served on the board of the Southwest you [117] know that their policies and identities save for some difference in the board are practically the same, are they not, Mr. Knox?

A. That is right.

Q. They are related organizations and work together? A. Yes, sir.

Q. Southwest buys it wholesale and then sells to the United which is the retail outlet, is that not the way they operate? A. That is right.

Q. Did Mr. Held attend the meeting of March 6 that was the occasion of your first meeting him?

estimony of Orville Knox.)

A. Yes.

Q. At that time did the members of the Board interview Mr. Held and have conversation with him regarding generally his qualifications, history and employment status?

A. Yes, they discussed with him quite a few things.

Q. Was there any mention made during that discussion by Mr. Held as to if he accepted employment how long a term it would be? Do you recall any conversation about the length of term of employment if he would become a member of the organization? [118]

A. I don't remember discussing that with Mr. Held but we were discussing it with Mr. Smith in a special meeting.

Q. After Mr. Held—— A. Withdrew.

Q. Was excused? A. Yes.

Q. After Mr. Held's qualifications were gone into and was discussed and there was a closed meeting of the Board? A. Yes, sir.

Q. Did Mr. Smith and the Board then discuss the possibility of employing Mr. Held?

A. Yes, sir.

Mr. Laney: Object to that as it was all merged into the resolution and preliminary discussions are not relevant.

The Court: Go ahead.

Q. What was said by Mr. Smith in the closed meeting with respect to the term of Mr. Held's proposed employment?

(Testimony of Orville Knox.)

A. The thing that was discussed was that our former manager had said that it would take from 2 to 5 years for a man to get his feet on the ground in a big organization like that and we felt that [119] we certainly should give him plenty of time. Mr. Smith kept plugging for a fair length of time of 3 years.

Q. The 3-year term was discussed in the closed meeting?

A. Yes, sir.

Q. Was there any objection by the members of the Board who were present at that time about the employment of Mr. Held for a 3-year term?

A. No, sir.

Q. Was there a discussion at that meeting concerning the rate of compensation to be paid to Mr. Held?

A. Yes, Mr. Smith tried to make that very clear because he was the man that was going to make the deal and a maximum of \$10,000 and we gave him liberty to go up to 5% of the net and of course he told us in there that he had too much Scotch blood in him to go out and sell the Association down the river. Of course he would try to make as hard a deal as he could with Mr. Held.

Q. Did the Board of Directors authorize at that meeting Mr. Smith to fix the compensation of Mr. Held up to \$10,000 plus 5% of the net?

A. I don't recall what the minutes said but I know that we gave him that liberty, yes. [120]

Q. Was there any discussion about giving Mr.

estimony of Orville Knox.)

Q. Did the right to supervise the employees—that is, hire and fire?

A. No, a manager wouldn't be worth anything if he didn't have that ability.

Q. Who was the previous manager?

A. Mr. Martin.

Q. Did he have the right to hire and fire?

Mr. Laney: Object to that. The record is the best evidence.

The Court: There might not be any record. Go ahead and answer.

A. Well, I know that it was brought out on one occasion that Mr. Martin said, "I can't tell you of all the times I have to turn people loose because they have sticky fingers." He said, "It is just too much detail to let you know." That was brought out in one of the meetings.

Q. Did Mr. Martin to the knowledge of the Board of Directors, the previous manager, hire and fire at his judgment?

A. Yes, sir.

Q. Had the Board of Directors ever objected to that type of management, that type of power?

A. No, sir. [121]

Q. Now, at this meeting March 6 at which the directors took action with respect to employing Mr. Held, was anything said by Mr. Smith to the Board as to whether or not he would or would not have complete authority to make a deal?

A. Yes, sir; that the thing that he wanted clear because he didn't want to have to come back to the board because we had been fooling around for quite

(Testimony of Orville Knox.)

a while without a manager and we knew we had to get the job done and get someone because things were getting in pretty bad shape out there.

Q. And did the Board give Mr. Smith authority to enter into a contract?

Mr. Laney: May it please the Court, the minutes of the meeting are the only way you can prove the authority.

The Court: There may not be any minutes of the meeting. They may have been written up after. They might not reflect what was said.

A. It was certainly the feeling of the Board, as I got it and certainly my feeling, that he had complete authority.

Q. Was anything said at that time at the discussion in the meeting with respect to authority to Mr. Wahmsley, the auditor, as to what part he was [122] to play in the employing of Mr. Held?

A. It was my understanding that he was to be used in considering the details which Mr. Smith wouldn't know or use as laymen wouldn't know and they would be used in offering any information that was necessary.

Q. Was there any suggestion or discussion in the meeting that unless Mr. Wahmsley signed a contract it would not bind the corporation?

A. No, nothing like that.

Q. Mr. Smith was the one who was given the authority to say yes or no as to whether a contract could be entered into with Mr. Held, is that correct?

A. Yes, that was my understanding.

Testimony of Orville Knox.)

Q. And was there action taken after Mr. Held was excused from the meeting giving Mr. Smith that authority?

A. Yes, by a resolution, I am sure.

Q. What was the next thing you heard about Mr. Held, whether or not he was or was not accepting the employment?

A. Was or was not accepting the employment?

Q. Yes. When was the next time?

A. There was a telephone call from Walter Smith immediately after having talked with Mr. Held [123] long distance and said that he would sign the contracts and mail them to him. He turned right around and phoned me because I had been very interested in getting the mess out there straightened out and getting it in the hands of a good man who could go to work and look after our interests.

Q. Mr. Smith then called you and informed you that he had communicated with Mr. Held by telephone and Mr. Held had advised him that he was signing the contract and putting it in the mail?

A. That is right, it was immediately after. It was early in the morning.

Q. When would that be with respect to Mr. Smith's death?

A. It was on a Friday morning before his death. I think it would be around the 21st, 22nd, somewhere in there.

Q. Within a very few days prior to his passing?

A. Yes, sir.

(Testimony of Orville Knox.)

Q. Was Mr. Smith at that time pleased or displeased about the acceptance by Mr. Held of his contract? A. Well, he was most elated.

Q. To your knowledge did Mr. Held report [124] for duty as the manager of the corporation thereafter? A. Yes, sir.

Q. Did you attend any meetings of the corporation thereafter at which Mr. Held was present?

A. I attended the organizational meeting. That would be as I here brought out the third of April I attended that.

Q. Was Mr. Held there? A. Yes.

Q. Was he there in his capacity as manager?

A. Yes, sir.

Q. Recognized as such by the Board?

A. So far as I know.

Q. Any objection made to him there or to the terms of his contract by any member of the Board?

A. No, we heard nothing.

Q. At any time to your knowledge either at a board meeting or any other occasion was Mr. Held ever given any express directions as to how he should go about learning the business, whether he should learn it from the inside out or outside in from his desk or outside or any particular directions given to him by the Board? A. No.

Q. Was there any instruction given to him [125] as to any particular hours that he should keep behind a desk?

A. No, I didn't hear of any at all.

Q. After the meeting of April 3 did you attend

(Testimony of Orville Knox.)

the meeting in May of the corporation or do you recall?

A. I missed the one in which he was going away.

Q. Just before he went away?

A. Yes, but we knew he was going because we asked him that before we ever hired him. He said he would leave the kids in school and he would go back in May to pick them up.

Q. Was that at the time he met with the Board?

A. Yes, sir, on the 6th of March.

Q. Was there any objection by any members of the Board at that time to that arrangement?

A. No, I heard none.

Q. How frequently were you in the office of the cooperative there, Mr. Knox?

A. After he was hired?

Q. After Mr. Held was hired.

A. Not at all.

Q. Did you ever see Mr. Held out away [126] from the office on company business?

A. He came around a few days after the first meeting and said that he had just come from Mr. Collier's attempting to meet all of the directors and find out what kind of farming they were doing and he spent some couple hours at my place. We went over the entire ranch and sat down and talked for quite a little while.

Q. Did you also talk at that time about the problems of the Co-Op and the Southwest Wholesale?

A. Yes, sir.

(Testimony of Orville Knox.)

Q. Did any of the members of the Board of Directors talk to you and advise about a telegram that was sent to Mr. Held on or about May 27 questioning the legality of his contract?

A. No, sir. I wasn't in on that at all.

Q. Was that an official meeting of the Board so far as you know?

A. I understood it wasn't.

Q. You weren't invited. You didn't attend a session at which that took place?

A. No, I wasn't notified. I understood it was being held at the Co-Op offices.

Q. How did you learn about that telegram?

A. Through Mr. Beggs who is one of our [127] directors and he told that in a regular meeting. I attempted to find out how it came about.

Q. Prior to the time the telegram May 27 was sent had there been any criticism raised about Mr. Held's employment or the manner in which he went about his duties?

A. I hadn't ever heard any.

Q. When was the first meeting, to your knowledge, held by the Board of Southwest Wholesale and United at which the possible termination of Mr. Held's contract was discussed?

A. I believe that was on the 9th of June.

Q. Were you present at that meeting?

A. Yes, sir.

Q. That was a formal meeting called special meeting of the board?

A. Yes, sir.

Q. Special meeting of the—of both boards at that time?

A. Yes, sir.

estimony of Orville Knox.)

Q. Was there any criticism made at that time that he had violated the terms of his contract by the way in which he conducted his duties?

A. Well, the only criticism I heard was that he didn't spend enough time at the office. [128]

Q. There was criticism of that kind?

A. Yes.

Q. Do you know who made that comment?

A. Mr. Collier.

Q. Did he say he made it from his personal knowledge or from what somebody told him?

A. I think possibly from his personal knowledge.

Q. The times he had been in there?

A. Yes, sir.

Q. Was there any other criticism of Mr. Held at that meeting? A. I don't recall any.

Q. Was there any discussion at that time as to whether or not his contract had been available to the members of the Board to see?

A. No, there had been no discussion about that.

Q. To your knowledge, was the contract available for the members of the Board to examine had they wished to do so?

A. Oh, I am sure of that.

Q. Did you know a written contract had been entered into?

A. Only through Mr. Smith and the fact [129] that he said he was going to sign it but I never saw the signed contract.

Q. But you were aware of the fact that a writ-

(Testimony of Orville Knox.)

ten contract had been entered into? A. Yes.

Q. Had that been mentioned at any board meeting, to your knowledge, that Mr. Held was?

A. I can't say.

Q. There is no doubt in—there was no doubt but what Mr. Held was attending the various board meetings as the manager, was there? Was there, Mr. Knox?

A. Yes, sir, because he was asked by our president if there was anything he wanted to say as to those meetings we attended.

Q. Who was the president?

A. Mr. Essley.

Q. Did he offer suggestions or make comments from time to time?

A. Of course at the first meeting he didn't have much to say because he was new. He did make some comment, and one of the second ones, I believe, that we should figure out a finance system which would probably include doing some business with the bank for co-operatives. [130]

Mr. Trask: I believe that is all.

Cross-Examination

By Mr. Laney:

Q. Mr. Knox, when Mr. Held was finally let go by the resolution of June 20, 1952, you were present at that meeting? A. Yes, sir.

Q. And you were the only dissenting vote in that? A. Yes, sir.

Testimony of Orville Knox.)

Q. And in the discussion in this meeting of March 7 of 1952 when the employment of Mr. Held was considered as you testified, you recall that the Board did put into a resolution what was the final result of what they decided? A. Yes, sir.

Q. And you recall that at the meeting of April of 1952 the minutes including that resolution were read there in the presence of Mr. Held and were approved by the Board, weren't they?

A. Yes, sir.

Q. And you recall, do you not, that the resolution there relative to his employment on March 6 of 1952—that that was pencilled out there by Mr. Smith, wasn't it? [131]

A. I believe possibly that is the way it was handled, I am not sure.

Q. And you recall that in the discussion of the employment of Mr. Held Mrs. McInerney was not present, was she? A. No.

Q. And she was the one who normally kept the minutes of the meetings, wasn't she?

A. Yes, but this was a closed meeting.

Q. And also that Mr. Wahmsley was not there, the auditor? A. No, sir.

Q. You are familiar with the minutes and to refresh your memory, you recall, do you not, that the resolutions actually passed there was that Mr. Smith and Mr. Wahmsley be authorized to employ Mr. Held as general manager and work out the terms of employment? A. That is right.

Q. And the Board there discussed the matter of

(Testimony of Orville Knox.)

their depending upon both Mr. Smith and Mr. Wahmsley to work out the terms of the employment, didn't they?

A. There was no discussion about depending on both of them, no.

Q. Well, they did discuss that, both of [132] them were to do it? A. That is right.

Q. And Mr. Wahmsley was the auditor?

A. Yes.

Q. And Mr. Smith was a farmer, wasn't he?

A. He was president, yes, sir.

Q. But he was a farmer, that is his business?

A. Yes, sir.

Q. Well, now, did you know anything about the fact that Smith alone had worked up this contract after the resolution was passed? Did you learn about that or not?

A. I doubt whether I did or not. I just don't know.

Mr. Laney: That is all.

Redirect Examination

By Mr. Trask:

Q. To refresh your memory, isn't it a fact that 6 of the directors of the Southwest Co-operative Wholesale are now different from what they were at the time when this purported contract of April 6, 1952, was made, the contract that is in evidence as Plaintiff's Exhibit 1? Aren't 6 of them different now?

(testimony of Orville Knox.)

A. I would have to stop and figure up. I know I had some deaths that changed some of them.

The Court: We will suspend until 10:00 in the morning. [133]

ORVILLE KNOX

Assumed the stand and testified further as follows:

Recross-Examination

By Mr. Laney:

Q. Mr. Knox, in this meeting of March 6 of 1952 that you were testifying about, who were present at that meeting? What directors?

A. I doubt if I could tell you all of them. I wouldn't be sure whether some of them were present.

Q. What ones do you remember were there?

A. Mr. Essley. Mr. Rovey. I remember there was quite a group. Mr. Ashby. Jack Click, Collier, and myself. I don't know whether there were any more or not for sure.

Q. The final agreement about employing Mr. Ralph W. Held was this resolution to authorize Mr. Smith and Mr. Wahmsley to employ him and work out the terms of the employment, wasn't it?

A. Yes, sir.

Q. Well, now, there was no motion made about what terms or what percentage or what salary, was there?

A. No, we had a working agreement just by

(Testimony of Orville Knox.)

talking the thing out because Mr. Smith, who was also present, wanted some leeway. [134]

Q. Now, you say you had a working agreement. Who agreed to it? Who agreed to anything there?

A. I would say that no one dissented. Maybe I should put it that way. There was no one that voiced any opposition to it.

Q. Did anyone say what would be the salary or the percentage?

A. Yes, we put a maximum of say \$10,000 and 5% of the net income.

Q. Now, who did that? Who said that?

A. I can't tell you.

Q. Who agreed to it?

A. I don't know that.

Q. Did Collier agree to it?

A. He didn't disagree to it. I would think that

Q. Was there anything said about that in the presence of Collier? A. Why, yes, sir.

Q. But he did not agree to it?

A. He didn't disagree to it. I would think that if a man didn't agree to it he would certainly disagree.

Q. There were many things talked about that just weren't decided, weren't there? [135]

A. Well, the man had to be told.

Mr. Laney: If the Court please, may the witness finish his answer?

The Court: Yes, go ahead.

A. The man had to be free to hire a man, that is what we were there for and we had to give Smith

(Testimony of Orville Knox.)

the latitude; we couldn't just harness him right down to bare facts or he couldn't work at all.

Q. Did anyone say that Smith and Wahmsley were to employ him for a definite period beyond the terms of the board without any escape clause at all, but if it wasn't mutually satisfactory? Did anyone say anything about that?

A. The only thing I remember is that we gave Mr. Smith the privilege to go ahead and hire Mr. Held.

Q. Now, who gave that? Who said that?

A. I couldn't tell you who said it because we were all talking. The whole thing, I suppose, came down in the form of a motion and that would be voted upon.

Q. But the motion said nothing about that, did it?

A. As to wages, no.

Q. And nothing about the term of employment, did it? [136]

A. I don't believe so.

Q. And then you say Mr. Collier didn't agree to it but he didn't say that he didn't agree?

A. Mr. Collier, all of us. There wasn't any of us that disagreed with us.

Q. Now, did Mr. Essley agree to any 3-year term?

A. Well, he didn't disagree. In conversation when you are talking about something and a fellow doesn't like it and he is one of the members he could disagree if he doesn't like it.

A. And did Mr. Ralph Ashby in any way agree

(Testimony of Orville Knox.)

that they could employ this man for 3 years without any escape clause?

A. Not in any specific words, but he didn't disagree.

Q. Well, he didn't disagree that you should refuse to employ him at all, did he? He didn't disagree to that?

A. There was no disagreement there at all. We were all just sitting there trying to work out something.

Q. Did Jack Click agree to any percentage, any maximum percentage or minimum percentage?

A. Well, Mr. Smith went out with the [137] understanding——

Q. No. Will you answer the question? Did Mr. Jack Click agree——

The Court: The answer would be the same as the others. You are wasting time here with that.

Q. Then when you passed the resolution you voted for that, didn't you? A. Yes, sir.

Q. And when that resolution was voted to leave it to Smith and Wahmsley to hire him and work out the terms of the employment, isn't it a fact that all of the terms were not known or understood there?

A. Well, they were discussed. Of course we were in a closed meeting and there were no records kept other than that motion that was made.

Q. Then you were the secretary of the meeting?

A. No, I didn't carry on any——

Q. You were the duly appointed secretary?

A. I am a secretary, yes.

(testimony of Orville Knox.)

Q. Did you make any minutes of anything other than this resolution?

A. I don't think I even made that because Walter Smith carried it on. I am sure I wasn't even asked [138] to serve as secretary.

Q. But that was the resolution. He pencilled out what you passed there. A. Yes, sir.

Q. Then coming to the meeting of June 9 you say the only criticism of Smith that you heard there from the Board members was that he didn't spend enough time at the office?

A. Mr. Held you mean?

Q. You say the only criticism that you heard of Mr. Held there was Mr. Collier's criticism that he didn't spend enough time at the office?

A. Yes, sir. I believe that is right.

Q. Well, now, what else was said by the others there in criticism of him?

A. Well, I doubt if any of them knew anything to say about him. I don't know.

Q. Isn't it a fact that Mr. Essley and others stated that they tried to see him and never could find him, that he wasn't doing any managing there?

A. They kept saying that he was being put in an impossible position and since he was in an impossible position then he just as well be fired.

Q. An impossible position in that he didn't seem to be able to do the job, was that it? [139]

A. No, sir.

The Court: What was meant by it?

(Testimony of Orville Knox.)

Q. What did they say about impossible position?

A. Well, it seemed to me like a whole trumped up affair because I knew nothing about it. They had these secret meetings and I hadn't been invited to them and this was my first knowledge of any disagreement or any believing that his contract wasn't legal so that was all new to me.

Q. Is that your complete answer? Now you say they had had these secret meetings. What secret meetings?

A. The only one I know of is the one that Mr. Biggs told me about that he had been asked to come to Mr. Wahmsley, to his office on East McDowell.

Q. That was a meeting called by Mr. Essley, the president, wasn't it?

A. Well, I suppose. I don't know. I received no notice of it.

Q. You do know that your residence was phoned about that and your relatives answered that you were on a hunting trip?

A. No, that is not right.

Q. Didn't you?

A. No, sir. I wasn't on any hunting trip. [140]

Q. You weren't? A. No, sir.

Q. You do know that you were phoned?

A. No, sir; we was not phoned.

Q. You know you weren't?

A. That is right. No one got any information about it at all.

Q. Well, now, in this meeting of June 9 in which

(testimony of Orville Knox.)

Q. Mr. Held was criticized, didn't Mr. Essley criticize him there and others?

A. Well, it seemed to be the whole thing that he couldn't be found in the office, yes, sir.

Q. It was destroying the incentive to work there, the people, the heads of departments that they got no co-operation from him?

A. No, I haven't heard that, no, sir.

Q. Now as to that meeting, at your suggestion, Pauline McInerney was excluded from it, wasn't it?

A. Yes, sir.

Q. And you were the secretary?

A. Yes, sir.

Q. And you kept minutes of it?

A. Yes, sir.

Q. And you never did produce the minutes, did you? [141]

A. No, sir.

Q. Why didn't you?

A. Because I was told to keep them in my personal files and it wasn't to fall into the hands of the help of the association.

Q. And you were told by whom?

A. By Mr. Essley.

Q. You were told to keep them in your hands, the minutes, and not give them to anyone else, not put them in the minute book?

A. That is right.

Q. Have you got the minutes now?

A. I can get them. I don't have them with me.

Q. Where are they?

A. I have them locked up in my car.

(Testimony of Orville Knox.)

Q. Will you produce them?

A. Right now?

Q. I mean during recess. A. Surely.

Mr. Laney: I think that is all.

Redirect Examination

By Mr. Trask:

Q. Mr. Knox, I believe you previously [142] testified—I will ask you again, isn't it a fact that the reason the Board authorized Mr. Wahmsley to participate with Mr. Smith was that Mr. Wahmsley could give Mr. Smith technical information regarding the amount of their earnings and the operations, is that not a fact? A. Yes.

Mr. Laney: I object to that as calling for his conclusion.

The Court: The Court has already reached the conclusion. Obviously they would have the auditor there for that purpose. The Court doesn't sit here entirely asleep.

Q. Mr. Knox, let me ask you, did you ever see Mr. Held on company business away from the office when he appeared to be exercising his duties as manager away from the office?

A. Well, on about 3 occasions, as I can remember, 2 of them with mechanical chopping demonstrations. There was a new machine that the Co-Op was attempting to sell and I believe the third one must have been a farm demonstration at the University of Arizona Experimental Farm. I know that he was

Testimony of Orville Knox.)

company with the manager of the field men at that time, Mr. Holmes. [143]

Q. So far as you know, did the Board of the Southwest, of which you were the Secretary, or any member of it, to your knowledge or in your presence, ever give him any instructions about how much money he should spend in the office?

Mr. Laney: Object to that as asked and answered already.

Mr. Trask: I asked Mr. Held that.

The Court: I don't remember. Go ahead.

A. No, sir; I know of no instructions.

Q. Is it not also a fact with respect to the bylaws of the Southwest Co-operative Wholesale Corporation of which you were secretary that they were amended from time to time by the Board of Directors?

Mr. Laney: Object to that. The record is the best evidence as to whether they did that.

The Court: It might not be material to this case anyway. A bylaw can be amended, we know that.

Mr. Trask: That is true and I want to show that as a matter of practice they were omitted by the Board of Directors and this witness was the Secretary and I think it has a material bearing, [144] Your Honor. I believe it might have on some of the low points.

A. I know that we revamped them in something like February or sometime in that year and did quite a little extensive revamping of certain parts.

Q. Amending of the bylaws? A. Yes, sir.

(Testimony of Orville Knox.)

Q. That was by the Board of Directors?

A. Yes, sir.

Mr. Trask: I believe that is all.

Mr. Laney: I believe that is all.

Mr. Trask: I would like to call Mr. Lewis G. Wahmsley for cross-examination.

LEWIS G. WAHMSLEY

called for cross-examination under the statute by the plaintiff, being first duly sworn, testified as follows:

Cross-Examination

By Mr. Trask:

Q. Where do you reside, Mr. Wahmsley?

A. 3025 North 61 Street, Phoenix.

Q. What is your business?

A. Certified public accountant.

Q. You are the auditor of the two defendant corporations in this case, Mr. Wahmsley? [145]

A. I am.

Q. How long have you been such auditor?

A. Since '46.

Q. You are also designated, I believe, as assistant treasurer? A. Yes, sir.

Q. You are not a member of the—of either corporation? A. No, I am not.

Q. Or an elective official in any way of either of them? A. No.

Q. You served by appointment of the Board of Directors? A. Yes.

Testimony of Lewis G. Wahmsley.)

Q. As such, Mr. Wahmsley, you attended board meetings? A. Yes, I do.

Q. You attended the board meeting at which Mr. Essley was elected president, did you not?

A. Yes, I did.

Q. You attended the meeting of March 6 of the corporation, did you not, March 6, 1952?

A. I was there and excused, Mr. Trask.

Q. Then the next meeting after March 6 [146] was the meeting at which Mr. Essley was elected president, was it not, April 3? A. Yes.

Q. You did attend that meeting? A. Yes.

Q. And at that meeting the minutes of the previous meeting were read and approved, were they not?

A. Yes, but I don't believe I was present at that, Mr. Trask, because you see usually I came down here and had to get the financial report ready and sometimes it wasn't ready by the office in time for me to check it over before the meeting and many times I would be 15 or 20 minutes late with the meeting because I would be in checking that report before I gave it.

Q. Now, the significance of that question, Mr. Wahmsley, is that at that time the minutes were read which authorized the employment of Mr. Held as the Board of Directors as manager of the corporation—the minutes do disclose that you were present at that meeting, do they not?

A. Yes, they do.

Q. And Mrs. McInerney kept the minutes of that

(Testimony of Lewis G. Wahmsley.)

meeting? A. Yes, she did. [147]

Q. And you don't know now whether you were or were not present at the exact moment that those minutes of the previous meeting were read, is that your testimony? A. That is right.

Q. But you wouldn't say you were present, would you, Mr. Wahmsley?

A. No, I wouldn't say I wasn't but I wouldn't say I was either because I don't remember whether I was or not.

Q. You do know as a fact that the minutes of the meeting officially show you were present. you know that? A. Yes, I know that.

Q. And you did know, as a matter of fact, at that meeting, the minutes of the March 6 meeting, were read and approved which stated the resolution authorizing the method of employment of Mr. Held as manager, you know that to be a fact, do you not?

A. Well, the minutes stand on their own, Mr. Trask—say that they were and I agree to that.

Q. Mr. Wahmsley, I asked you to produce certain records of the corporation among which were the records of the annual report or audit of each of the defendant corporations for the 5 years [148] 1947 to 1952, did I not? A. Yes, you did.

Q. Do you have those records?

A. I have all except 1949 and 1950, Mr. Trask, and I don't have a typewritten copy but it is all condensed on each report there as far as the net income is concerned.

Q. As far as net income is concerned?

Testimony of Lewis G. Wahmsley.)

A. The net savings.

Q. You first used the term net income, is that a term that is generally applied to the earnings of the corporations?

A. No, it is not.

Q. Why did you use it when you first expressed your opinion as to the showing of the reports?

A. Because it does show the net income.

Q. May I see the reports, if you will, please?

A. There is the condensed right there.

Q. This is for the current year ending——

A. 1953.

Q. Do you have the 1952?

A. That audit is still in process.

Q. Do you have the reports for the previous year, 1951 and 1952?

A. Yes, I have. [149]

Q. You recall your conversations, your meeting with Mr. Held at the Arizona Club at which you discussed with him the computations of his compensation. You recall that before he was employed?

A. Well, I recall a meeting at the Westward Ho, Mr. Trask. That is where the bulk of the conversation relative to compensation took place.

Q. Irrespective of whether it occurred you did have a conversation with Mr. Held at which there was discussion as to the fixed compensation and the percentage compensation, did you not?

A. Yes, and there were many methods discussed and none was agreed on.

Mr. Laney: May we get the date of this?

Q. What was the date of the conversation at the Westward Ho?

(Testimony of Lewis G. Wahmsley.)

A. It was on the night of the 6th when Mr. Held came in. Mr. Smith and I met him out at the airport.

Q. You also had a conversation with Mr. Held, a meeting with him when you and Mr. Held had dinner at the Arizona Club? A. Yes, I did.

Q. And that was for the purpose of you [150] going over, with Mr. Held, the general technical terms of the contract of employment, was it not?

A. Not to my knowledge, it was not.

Q. Well, what did you discuss there at that time? When was this meeting at the Arizona Club?

A. On the 7th of March.

Q. In the evening, just you and Mr. Held present? A. Yes.

Q. What was the purpose of your having a dinner meeting with him at that time?

A. Mr. Smith asked me to entertain Mr. Held that night that he was tied up.

Q. So——

A. So I took him to the club for dinner.

Q. Did you understand it was just an entertainment assignment?

A. Well, to my knowledge it was.

Q. What did you discuss there? Didn't you discuss his proposed employment and the terms of it at that time?

A. No, we discussed the possibilities of the company. We discussed the Mohawk-Elton area and the possibility of the company moving into that area and developing a store over there. [151]

Testimony of Lewis G. Wahmsley.)

Q. Then let's get back to the meeting at the Westward Ho on the previous night, on that occasion you did discuss with Mr. Held the fixed compensation and the computation of the percentage compensation, did you not?

A. Yes, we did. We certainly did.

Q. And you were discussing it on the basis of the percentage, on the basis of the percentage of approximately \$400,000 of either net income or net savings that the corporation had earned during the period of the year closing 1951 which was the last complete year that was available at that time.

A. Well, we discussed if that was the net margin for that previous year.

Q. And you did discuss at that time also, did you not, Mr. Wahmsley, that in determining a percentage compensation for Mr. Held the percentage should be applied to that figure, did you not?

A. No, we did not, Mr. Trask. After all, I mean in my position I couldn't say when the records show that it varied from \$121,000 up to \$400,000. I couldn't say that it would constantly remain at \$400,000.

Q. That is right. I know that you couldn't but that was the figure to which the percentage should be applied, whether it was \$100,000 or \$400,000, whatever [152] it should be. That was the figure to which it should be applied, was it not?

A. That is what we discussed, yes.

Q. So whether it was net savings or net income or however you label it on your report, it was that

(Testimony of Lewis G. Wahmsley.)

principal figure of either net savings or net income that you were discussing to which the percentage should be applied, was it not?

A. That is right. That is what we were discussing.

(Plaintiff's Exhibit 9 marked for identification.)

(Plaintiff's Exhibit 8 marked for identification.)

Q. I will hand you now, Mr. Wahmsley, Plaintiff's 8 for identification and ask you to state for the record what that document is?

A. This is a financial statement, United Producers and Consumers for the fiscal year ending February 29, 1952.

Q. That was the last complete year prior to the time Mr. Held was employed as manager, was it not?

A. Yes, it was.

Q. Would you turn to the page on which it shows the net earnings or net savings as the case [153] may be, of the 2 corporations for that period. Do you have the page there?

A. Yes.

Mr. Trask: I offer these in evidence.

Mr. Laney: No objection.

(Plaintiff's Exhibit 8 received in evidence.)

Q. Now, referring to Plaintiff's 8 in evidence, Mr. Wahmsley, you had referred me, I believe, to an Exhibit B which shows the statement of opera-

Testimony of Lewis G. Wahmsley.)

ons and margins of the United Producers and
consumers Co-operative for the fiscal year ended
February 29, 1952, is that correct?

A. That is right.

Q. And that exhibit shows the gross business
done by your purchases by patrons, does it not?

A. Yes, it does.

Q. And it also shows the gross expense which
is charged against that volume of business?

A. That is right.

Q. Then it shows a margin which is the differ-
ence between the gross sales and the gross expense,
does it not? A. Yes, it does.

Q. What is the margin for that year [154] end-
ing February 29, 1952? A. \$389,141.85.

Q. Then does this exhibit also show the similar
figures for the year with respect to Southwest
Wholesale? A. Yes, it does.

Q. Would you refer to that?

A. Well, that, Mr. Trask, is the combined—you
have picked up revolving certificate from the South-
west.

That reflects both the United and the Southwest
because in that figure you have picked up the re-
volving certificate from the Southwest for that pe-
riod.

Q. So that actually reflects what, in ordinary
corporate practice, would be the net income or net
earnings for both corporations during that period,
is that right, Mr. Wahmsley?

A. Well, there would be a slight additional net

(Testimony of Lewis G. Wahmsley.)

margain there on the Southwest distributed to those other 4 members.

Q. And what would that amount to, that slight addition?

A. The first one, \$486. Imperial Haygrowers, \$14.74. Arizona Citrus Growers, \$169.56. [155]

Q. What is the total figure on those?

A. \$4,387.20.

Q. That figure plus \$389,000-odd figure that you have just testified to would represent the net earnings or net income or net savings for the 2 corporations for that period, would they not?

A. Yes, they would.

Q. I believe you have let me show you Plaintiff's Exhibit 9 for identification, and I ask you to state if that is the annual report for what corporation for the current fiscal period ending in 1953?

A. That is the Southwest Co-operative Wholesale, the fiscal year ending February 28, 1953.

Mr. Trask: Offer it in evidence.

(Plaintiff's Exhibit 9 received in evidence.)

Q. Showing you Exhibit 9 in evidence, as I understand it, these are the annual figures only for Southwest Wholesale? A. That is right.

Q. And what do they show with respect to net savings or net income or net earnings, however you express it, for the current fiscal year?

Mr. Laney: I object to counsel using them as synonymous net savings, net income. They [156] are different. The witness has so testified.

Testimony of Lewis G. Wahmsley.)

A. The net margin is \$194,975.68.

Q. But that is only of the Southwest Wholesale?
A. That is right.

Q. Where are the figures with respect to the United Producers and Consumers for that year?

A. Well, they are not complete yet, Mr. Trask. They will be complete, but I can tell you approximately—approximately \$40,000 more.

Q. \$40,000 more than what?

A. Than the \$194,000. From the United.

Q. Then the combined figures for the 2 corporations for the current year would be about, in round figures, approximately how much?

A. \$235,000.

Q. That represents a reduction from the figures for the last fiscal year?

A. That is from the previous fiscal year, yes.

Q. Where they were \$389,000?

A. That is right.

Q. Are your figures actually complete to the extent that you know that those are the approximately accurate figures? [157]

A. Well, I can have you the complete audit in another 10 days. I think we can have it typed up and finished by that time.

Q. In addition to those 2 figures that you have testified to about now, was there some additional figures such as you testified about to the 1952 fiscal year, an item of around \$4,000? Is there such an additional figure for the current fiscal year that you have not included in your computation?

(Testimony of Lewis G. Wahmsley.)

A. No, there is not. You see you have the full amount of Southwest here, the figures you were talking about a while ago were on the United, which takes only the revolving fund certificate from the Southwest.

Q. Then the figure that you have given me is the complete total so far as you know?

A. Yes, that is approximate. It may be \$300 one way or the other but I think that is approximately it.

Q. Do you have the reports for the years ending 1951?

A. 1951?

Q. Would you refer to your records and tell me, if you will, please, what the figures were for [158] the difference between gross business and gross expense for the combined corporations during that period? Have you got those figures?

A. You have one of the reports there. I will have to have it. United shows a net margin of \$256,715.41 and to other members of Southwest is \$9,984.78, giving combined total \$266,719.

Q. For what year is that?

A. Fiscal year ending February 28, 1951.

Q. Does that figure include the total net margin for both the Southwest and the United and other members, as you expressed it?

A. Yes, it does, Mr. Trask.

Q. Would you give us the figures for 1950 on the same basis? Is that going to take you a little time?

A. Yes.

Mr. Trask: If the Court please, may I call him

Testimony of Lewis G. Wahmsley.)

back after the recess for the purpose of giving us those figures and on now?

The Court: Yes.

Q. Mr. Wahmsley, you will be kind enough to compute those figures?

A. Yes, I will be glad to and give you a schedule on each year. [159]

Q. While you are still on the stand, there are some other questions I want to ask and particularly with respect to the figures that you have given me for the current year ending 1952-53. Were there any patronage refunds or dividends declared during the year which would affect the total that you have given me there?

A. Well, there is a refund on fertilizing insecticide which is a cash refund.

Q. In other words that would be a net margin which would otherwise have been included in the 1 to '52 figure that is not reflected in that figure, that correct?

A. Well, that is an adjustment in price, Mr. Frank, mainly for computation purposes.

Q. Let me get back to the question. That is in the '52. '52 net margin figures for the entire year, there is included a figure of the refunds on insecticides and fertilizers, was there not?

A. Yes, sir.

Q. And in '52 and '53 net margins you had taken that figure out, is that correct?

A. Well, both years reflect according to the same practice there.

(Testimony of Lewis G. Wahmsley.)

Q. Well, just answer the question. In [160] '52-'53 you had taken that figure out, had you?

A. Yes, and likewise I had taken it out in '51-'52.

Q. Well, in '52 and '52 in the \$389,000 figure, had those refunds or discounts been taken out?

A. Yes, they had.

Q. So if those discounts or refunds would be added to the '51 and '52 figure, how much would it raise that above the approximately \$389,000 figure to which you have already testified?

A. I would have to check the record to be accurate.

Q. Would you do that during the recess? I would like to have those figures for each one of the years.

A. Well, I don't know whether I can get it or not in the recess. I will have to go clear down to the office there and get it, Mr. Trask, but I think we ought to bring out to the Court here that for instance you relate \$151 a ton for competitive purposes and at the end of 60 days why you refund \$13 a ton which is a price adjustment and not considered in your margin of operation.

Q. That same method of doing business is the co-operative method of doing business [161] throughout, is it not, Mr. Wahmsley?

A. That is right.

Q. And you do that through all of your operations and those are your totals that are reflected by your net margin, is it not, is that not a fact?

A. No, it is not a fact.

Q. Isn't it a fact that your method of doing

Testimony of Lewis G. Wahmsley.)

business, your operation, is that you charge on a current competitive level and then your margin of profit you discount or give back to your members of your consumers and that is the dividend or the benefit they derive from operating as a co-operative operation, is that not a fact?

A. Well, there is 2 types. In other words there is a cash refund for adjustment in price to our ordinary required margin, and then there is the revolving fund certificate issued at the end of the year out of the margin which we set up as a standard that we want to be governed by.

Q. In both instances, Mr. Wahmsley, your retail outlet sells to a consumer at a competitive price and then there is a refund to the consumer in the form of a dividend or a rebate or whatever you call it that creates the advantage to which he is entitled as a member of the Co-Op whether it is by [162] cash or credit at the end of the year, is that not a fact?

A. That is right.

Q. And if you would figure your cash discount the same as the refund on the other merchandise that you sell only you handle it in a little bit different manner, is that not a fact?

A. No, because on fertilizer insecticide they get their revolving fund certificate based on their net purchases there just like they do on every other item.

Q. But insofar as this particular item of insecticide and fertilizer that isn't reflected in these net margin figures, it is a charge that is made to the

(Testimony of Lewis G. Wahmsley.)

consumer at a competitive price and then a cash refund to the consumer to show the advantage he gets by being a member of the Co-Op, is that not a fact? That is the way it is handled, is that not a fact?

A. Well, that is true but the reason that the price at the time of this cash refund is set at that price is due to your source of supply.

Q. Irrespective of the reason for it, in either event, in the revolving fund certificates or however you call them which are returned to the consumers at the end of the year and the cash refund [163] on the insecticides, the difference between the sales price which is originally charged and your cost of operation, is your margin, as you call it, between gross sales and cost, is that not a fact?

A. That is right.

Q. And by excluding from the year 1952 and from the year 1953 your cash refunds, you have excluded a figure which would ordinarily be reflected in the net margin, have you not? A. No.

Q. Let me go on to something else. I think I have in general what you have in mind.

I asked you also to produce for me, Mr. Wahmsley, the monthly comparison figures for the months during which Mr. Held was there to show the comparative figures for those months he was there and the months in the previous year. Have you produced those figures? A. I have.

(Plaintiff's Exhibit 10 marked for identification.)

Testimony of Lewis G. Wahmsley.)

Q. Showing you Plaintiff's 10 for identification, the papers that are fastened under this fastener, the top paper which is headed, "Monthly Report at a glance, Month of February, 1953"—those [164] over the monthly reports of your operations during the period Mr. Held was there and for the year previous, do they not? A. Yes, they do.

Mr. Trask: Offer them in evidence.

Mr. Laney: May I ask one or two questions on your direct?

Q. (By Mr. Laney): Is all of this just confined to a showing of comparison between the months when Mr. Held was there and the like months of the previous year or is there other additional data in this?

A. That is a complete file, Mr. Laney, month by month since March 1, 1950.

Q. And all of this is necessary to show what that comparison is, is it?

A. Well, I don't think that that is necessary. I mean you can take the sales analysis there which will show the sales for the current year and the previous year in the same month and operating expenses likewise.

Q. I notice some looseleaf in these. Are these part of that?

A. No, those are other work papers.

Q. Are they part of this? [165] A. No.

Mr. Laney: I would think, may it please the court, this man can summarize the data and give

(Testimony of Lewis G. Wahmsley.)

it. It seems there is a lot of stuff other than what is needed here.

The Court: Yes.

Q. (By Mr. Trask): Mr. Wahmsley, would you please at the recess segregate from those or make notes so that you can testify from them as to the gross business done for the months of April, May, and June and July of 1952, those being the months that Mr. Held was at the United Producers and Consumers and the Southwest as manager and the gross sales figures for the same months in the previous year, the 1951 gross sales figures. Are those figures all contained in the exhibit which has just been handed to you? A. Yes, they are.

Q. Can you give it to us quickly right now?

The Court: We will have a recess.

(A brief recess was taken.)

Q. Have you had time to give us the computation on the total net margin for the two corporations for the years 1950 and 1951?

A. No, I was compiling the information [166] on the gross patronage during the 4 months you asked for.

Q. You haven't made the other computation?

A. No, I have not.

Q. Then on the gross business done during the months of April, May, June and July of 1951 as compared to April, May, June and July of 1952, what do those figures show on a comparative basis?

(Testimony of Lewis G. Wahmsley.)

Q. Have you written those out, copied them from the record?
A. Yes, I have.

(Plaintiff's Exhibit 11 marked for identification.)

Q. Showing you Plaintiff's 11 for identification—that is the comparative schedule that I have asked you to prepare during the recess and which you have prepared from the books of the corporation records.

A. Yes, there is one addition there, Mr. Trask. I put March on there in addition to the months you asked for.

Mr. Trask: Offered in evidence.

Mr. Laney: There is no objection.

(Plaintiff's Exhibit 11 received in evidence.)

Q. Then showing you Plaintiff's 11 in evidence, Mr. Wahmsley, it shows that for April, 1951, as compared to April of 1952 there was an increase in gross [167] business, does it not?

A. Yes, it does.

Q. And for May there was an increase in gross business?
A. Yes, there was.

Q. In June of 1951 as compared to June of 1952 there was a decline of less than \$1,000 on a total of around \$279,000?
A. That is right.

Q. And for July there was a decline of around \$3,000 out of a total of \$434,000, is that correct?

A. That is right.

(Testimony of Lewis G. Wahmsley.)

Q. And the Southwest Co-op figures on a comparative basis are about the same ratio?

A. Well, you see your United Producers are your biggest customer in the Southwest so naturally as United Sales go up, Southwest automatically increase.

Q. They both operate in the same ratio. Mr. Wahmsley, you knew at the time of your meetings with Mr. Held beginning in Chicago and on through until he began his employment, you knew that he was being negotiated with for a contract to act as manager, did you not?

A. Well, the first meeting, Mr. Trask, I think, was mainly interested in finding out if Mr. [168] Held had someone he could recommend. After that point I think negotiations were with Mr. Held because at that first meeting why he made it plain that he would be interested in looking the situation over.

Q. And when he came out here on his first trip at which time he stated that he was not interested and went back you knew that he was being negotiated with then for a position as manager, did you not?

A. Well, he was invited out to look over the situation and see if he could be interested in the position.

Q. As manager? A. That is right.

Q. And when he came back the second time you knew that he came back for the purpose of being

Testimony of Lewis G. Wahmsley.)

interviewed to see whether the corporation could employ him as manager, did you not?

A. That is right.

Q. And when he met on the various occasions with the Board of Directors and with you and with Mr. Smith, separately and together, you knew that you were negotiating with him on the basis of contract as manager, did you not? A. Yes, I did.

Q. And he said on several occasions to you and to Mr. Smith in your presence that he would come out [169] here only on a 3-year term, did he not?

A. I don't remember that, Mr. Trask.

Q. Don't you, as a matter of fact, remember the discussion of a 3-year term? A. No, I do not.

Q. Do you not remember ever discussing a 3-year term?

A. No, I do not. We discussed several terms.

Q. What terms did you discuss?

A. Well, we discussed the first year if services were satisfactory then it should be on a basis—in continuing basis, but I don't believe that we ever came to any firm understanding as to the term of the contract.

Q. Well, I am not asking you as to the exact term of the contract but you discussed a 3-year term of the contract, did you not?

A. We discussed—yes, 3 years and 5 years.

Q. That is right, and you also discussed a \$10,000 annual salary, did you not—fixed salary?

A. Yes, we did; we discussed a \$10,000 salary. We discussed an \$8,000 salary, too.

(Testimony of Lewis G. Wahmsley.)

Q. And you discussed a percentage of the net, did you not?

A. Of the net margin, yes, we did. [170] Likewise that was discussed from 2% to 5%.

Q. When did you first learn the written contract had been entered into?

A. Sometime in March.

Q. Before Mr. Held came here to begin his employment? A. I believe so, Mr. Trask.

Q. As a matter of fact, didn't you learn about it, didn't you know that a copy of the contract was in the files of the corporations at all times after March 7 when Mr. Smith signed it on behalf of the corporation?

A. Not at all times but I knew after that period there was a copy in the files.

Q. And you had read it, had you not, before Mr. Held came here to work for the company?

A. Yes, I have read it.

Q. And did you ever make any objection to the terms of it to any members of the corporation?

A. I am not a lawyer, Mr. Trask, I am a public accountant. I did not have knowledge of the fact that I was authorized to negotiate that contract there. I could not take exception to what the president had done.

Q. You never made any objection to it? [171]

A. No, I didn't.

Q. In any way?

A. I had no basis and no authority to take exception to it.

Testimony of Lewis G. Wahmsley.)

Q. Now, did I understand you to say in your meeting with Mr. Held at the Arizona Club you didn't discuss the terms of employment, that was simply a social visit?

A. We discussed the possibilities of the company and I would say possibly something in the way of employment and compensation came up but that was not the main topic of conversation.

Q. Well, let me call to your attention, do you recall when your deposition was taken in this matter? A. Yes, I do.

Q. And I asked you—let me ask you if these questions were not asked and these answers made, beginning at Page 18 of the deposition:

“Q. Do you recall a meeting with Mr. Held at the Arizona Club? A. Yes, I do.

“Q. When was that?

“A. I don't remember the exact date but it was in the neighborhood of this period early in [172] March.

“Q. Who was present at that?

“A. Mr. Smith, no just Mr. Held and myself, I believe.

“Q. Did you and Mr. Held at that time have any discussion with respect to the terms of employment? A. Yes, we discussed it.

“Q. Did you discuss compensation at that time?

“A. Yes, we did.

“Q. Did you discuss his official duties?

“A. Not to any great degree, Mr. Trask.

“Q. Did you discuss at that time whether or not

(Testimony of Lewis G. Wahmsley.)

he would have the right to employ and discharge other employees?

“A. Well, we discussed it to this extent, that I made the opinion that for a manager he should have the right to handle his employees and that he should have the right to hire and fire with cause.”

Q. Those questions were asked you at the time of the deposition and those answers were given?

A. Yes, that is right.

Q. Now, with your memory thus refreshed, do you now recall that you did discuss the terms of employment [173] to that extent at your meeting with Mr. Held?

A. I would say yes, Mr. Trask, but I still contend that the basis of our conversation at that meeting was not his employment, it was based on what the company could do and the possibilities of the company, it was not entirely on the employment angle.

Q. Actually you have never had any substantial objection to the contract even as it exists at the present time, have you, Mr. Wahmsley?

A. Yes, I have.

Q. What was that objection?

A. Because there is no basis of termination or no escape clause for either party in there.

Q. And what clause do you think should be there?

A. Well, it should provide for some termination if not satisfactory, the services of the employee;

Testimony of Lewis G. Wahmsley.)

Q. Likewise if he is not satisfied with the company he would not be held.

Q. In other words, it should be a contract for 3 years terminable by either party if the services are not satisfactory, is that your interpretation of what you would like to have?

A. Specified notice of termination with the means in which it could be terminated and the damages [174] to either party.

Q. And damages to either party?

A. That is right.

Q. Oh, I see. Just a contract for 3 years terminable if either party is not satisfied wouldn't be much of a contract would it, Mr. Wahmsley?

A. Well, if you will take the contract of Mr. Held, that Mr. Held dictated his contract from—

Q. Just answer my question, please. If you have a contract for 3 years—

Mr. Laney: I think he is answering it.

Q. It would be terminable upon dissatisfaction by either party—that wouldn't be much of a contract whether for the corporation to rely upon or for the individual to rely upon, would it, Mr. Wahmsley?

A. That is a normal contract of employment, Mr. Trask.

Q. So neither the employee nor corporation would know from day to day or hour to hour whether the employee had a job or the company had an employee?

A. If their services were satisfactory they wouldn't have to be concerned about that.

(Testimony of Lewis G. Wahmsley.)

Mr. Trask: I believe that is all. [175]

Direct Examination

By Mr. Laney:

Q. Mr. Wahmsley, these figures that you gave, the approximately \$400,000 and then I take it for the year ending in February of 1952—what do you call that? Do you call that margin or what?

A. Net margin, yes.

Q. Well, now, counsel has used with you apparently interchangeably the term net income. In the books and records of the company in the parlance of co-operatives are those 2 the same?

A. No, they are not. The net income is the amount that you report for tax purposes.

Q. And that comes from what?

A. From the non-member business. The remaining net margin is distributed to the members in proportion to their purchases.

Q. And then this margin, I will ask you whether the company is under contract, that the members are simply advancing that money to the company for its use?

Mr. Trask: I object. It calls for a legal conclusion. It may be determined by the bylaws, the articles, but not by this witness, I submit, if the Court please.

Q. Well, are you familiar with the bylaws [176] in that respect?

A. Yes, I am familiar with the bylaws and I

testimony of Lewis G. Wahmsley.)

also familiar with the contractual obligation that they make at the beginning of each year for their purposes. I advise that they make the contract at the first board meeting.

Q. And in substance what do they agree to?

Mr. Trask: If the Court please, I believe the contract is the best evidence.

The Court: I think so.

Q. I call your attention to the minute book of the United Producers and Consumers Co-operative and particularly to the minutes of the meeting of February 21 of 1952 and I will ask you to state whether you are familiar with and know those to be the minutes and especially the resolution appertaining to what we are talking about? A. Yes, it is.

Q. Now, I will ask you to read that resolution as it appears on the record.

A. Upon a motion of Mr. Collier duly seconded by Mr. Essley, the following resolution of the Board of Directors was unanimously adopted: Be it resolved that a record of business done with patrons from and after [177] March 1, 1952, shall be maintained and at the close of this association's fiscal year the net savings for the year shall be credited to the patrons on the books of this Association in proportion to their patronage. Such credit shall represent the liabilities of this corporation as of the close of the fiscal year and be subject to the provisions of Article 19 of the Bylaws of this Association providing for a revolving fund as therein provided.

(Testimony of Lewis G. Wahmsley.)

Q. And I will ask you whether that same resolution has been passed since then in 1953?

A. Yes, it has.

Q. And was it before that in 1951?

A. Yes, for tax purposes that is a very controlling factor. The contract has to be made at the beginning of the year.

Q. Now, opposing counsel in their subpoena directed you in addition to what they talked about—any income tax returns or information returns filed by the United Producers and Consumers Co-Operative and the Southwest filed were either State of Arizona, or U. S. for the years 1948 to 1952, inclusive. Now as a sample how about that filed for 1952? Is that the last you have? [178]

A. Well, the last I have on Southwest is February 28, 1953, which would be the 1952 fiscal year.

Q. And have you that here? A. Yes, sir.

Q. Does that in any place speak of the income—net income? A. Yes, it shows net income.

Q. And was there any net income as to Southwest Co-operative Wholesale?

A. No, there was not.

Q. And then have you the tax return for the year 1952 of the United Producers and Consumers Co-operative?

A. That has not been filed. I have the one for the fiscal year 1951 which was February 29, 1952.

Q. Does that speak of the net income?

A. Yes, it does.

Q. And what was the amount of the net income

Testimony of Lewis G. Wahmsley.)

or that year, that was the year 1951—what was the amount of the net income? A. \$21,760.60.

Q. And you say you haven't worked it up for the year 1952 for that company?

A. No, we don't file a tax return until the audit completed. [179]

Q. Now counsel asked you about the meeting when you took Mr. Held to dinner at the Arizona Club. Now when was that with respect to the time that you now have learned Mr. Held and Mr. Smith had signed this contract? A. That was—

Q. Well before or after?

A. It would have been before, Mr. Laney.

Q. Then on what date was that if it was in the evening? Just search your memory and find out.

A. Well, I am not sure. They testified it was on March 7 and I was just assuming it was but it might have been on the 6th, as I stated in my first testimony.

Q. Assuming that the contract was signed by Mr. Smith at something like 5:30 on March 7, was this meeting before or after that?

A. Well, it was the day before, Mr. Laney, because I didn't see Mr. Held after that contract was signed. He left immediately on the plane.

Q. I will ask you whether at that meeting you and Mr. Held ever came to any agreement in your own minds as to the terms of the contract and the length of it? A. No, we did not.

Q. And did he and Mr. Smith ever at any [180] time in your presence, say at the meeting at the

(Testimony of Lewis G. Wahmsley.)

Westward Ho some time a little before that—come to any agreement on the terms of the contract?

A. No, sir.

Q. As you have now learned, Mr. Smith had signed this contract, Plaintiff's Exhibit 1, and given the 2 signed copies to Mr. Held. Now in that, before that and from the time of the meeting of March 6, when the resolution was passed authorizing the employment of Held, from that time until that contract was signed I will ask you whether you were available so that they could have consulted you if they wanted to?

A. Yes, I was.

Q. And did they consult you at all?

A. No, they did not.

Q. Did you ever at any time agree with Held or with anyone else to the terms of that contract which is Plaintiff's Exhibit 1?

A. No, I did not.

Q. Now, when you say you saw that contract—early in April, I believe you first saw it, you said?

A. No, I saw it, Mr. Laney, in March [181]

Q. Now, you saw that about when? [181]

A. Oh, I would say around the 9th or 10th, 11th of March.

Q. Now, at that time did you have any knowledge that you had been delegated the authority or the duty to negotiate that or pass on it?

A. No, I did not.

Q. If they had consulted you would you have

Testimony of Lewis G. Wahmsley.)

agreed to a 3-year contract without any escape clause? A. No, I would not.

Mr. Trask: Calls for speculation.

Q. In asking you about why you objected, you started to answer about what Mr. Held—the sample contract that he produced here that he said was what he had along with him and dictated from, Plaintiff's D for identification—I will ask that be marked in evidence, it was for identification.

(Defendant's Exhibit D received in evidence.)

Q. Concerning what you were about to answer about the escape clause, I will ask you to state whether or not something of that sort is embodied in Section 11 of that contract?

Mr. Trask: The exhibit is the best evidence as to what it contains.

Mr. Laney: Defendant's counsel was asking what he objected to and if he thought any contract [182] ought to be——

The Court: I know, but I believe this is wasting the Court's time.

Mr. Laney: Very well.

Q. Now, when counsel brought out from you that there was no escape clause in that contract; when did you first raise that point? He asked you if you ever objected?

A. On the meeting of May 27 when I read the contract to that informal meeting of the Board of Directors, I pointed out at that time that there was no provision for cancellation on either part and that

(Testimony of Lewis G. Wahmsley.)

I did not think that anyone should enter into a contract where there is no provision for either party to get out. It works to the disadvantage of——

Mr. Trask: Object to the witness continuing a voluntary answer that is non-responsive. Move it be stricken.

The Court: It may be.

Q. Now, opposing counsel got you to compute certain figures from your report on a yellow sheet of paper which showed that during April and May there was some increase in the business of both companies in the year 1952, over and above that in the year 1951. I will ask you to state whether this was that same trend [183] in March before Mr. Held came here. Is that true or not?

A. Yes, that is true.

Q. Well now, what figures was for March of 1951? A. \$289,176.76.

Q. What for the year 1952?

A. \$305,798.59.

Q. Do you know why there was that trend?

Mr. Trask: I object. It calls for an opinion and conclusion.

Mr. Laney: What was the condition as regards cotton?

The Court: That doesn't make any difference.

Mr. Laney: That is all.

Mr. Trask: I have no further questions of the witness except that I would like to have the figures that I have previously asked the witness for. That is, the net margins for the years 1950 and 1951 and

(Testimony of Lewis G. Wahmsley.)

would like to have the figures for the net margins on sales of insecticides about which the witness has testified were not included in the net annual figures because they were considered cash discounts rather than customer discounts and subject to getting those figures [184] I would like to discuss them with the witness.

The Court: All right.

The Witness: May I ask if you want that for all 4 years, do you not?

Mr. Trask: Yes, I would like to have the net margin figures for the years 1950 and 1951. I believe you have given it for 1952 and '53. And also I would like to have the figures of the net margins on the cash discounts on the insecticides concerning which you testified for all 4 years.

The Witness: For all 4 years?

Mr. Trask: Yes. Subject to that testimony, if your Honor please, the plaintiff is about ready to rest. Before the plaintiff rests, the plaintiff moves the Court for an order granting a trial amendment to the method of stating the damages although counsel feels the complaint is sufficient lest there be any objection as indicated by counsel for the defendant, the plaintiff before resting, moves to amend the prayer of the complaint and the paragraph alleging damages to conform to the evidence to show that the plaintiff prays for damages for loss of benefits under the contract in the sum of approximately \$22,000 and for special damages for travel and expense of travel at \$454, for moving expense

(Testimony of Lewis G. Wahmsley.)

\$500, and for damages for forfeiture of [185] the contract on the purchase of a house in the sum of \$2100.

Mr. Laney: May it please the Court, the defense objects to that, under Rule 9 of the Rules provides that when the items of special damages are claimed, they shall be specifically stated.

(Argument to the Court.)

The Court: Motion is granted.

Mr. Trask: The plaintiff rests.

D. O. ESSLEY

a witness called by and on behalf of the Defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your business? A. Farmer.

Q. I will ask you whether you are connected with the United Producers and Consumers Co-operative and Southwest Co-operative Wholesale?

A. I am.

Q. And in what capacity?

A. Presently that of president.

Q. President of each company? A. Yes.

Q. And a member of the Board of [186] Directors? A. That is right.

Q. Who was the president just before you?

A. Walter L. Smith.

Testimony of D. O. Essley.)

Q. Is Mr. Smith living or dead?

A. He is not living.

Q. Do you recall at this time the date when he died?

A. I believe it was the 25th of March.

Q. 1952? A. 1952, yes.

Q. I will ask you whether you were present at the board meeting, Board of Directors of the 2 companies, that was held on March 6, of 1952. That has been mentioned here, the meeting in which there was some resolution about employment of Mr. Held. Were you present at that time?

A. Yes, I was there.

Q. And at that time was Mr. Smith president of the corporations? A. Yes.

Q. And were you a board member?

A. Yes.

Q. Of each? A. Yes.

Q. Now I call your attention to the [187] resolution that has been shown in evidence here stating that Mr. Smith and Mr. Wahmsley are authorized to employ Mr. Held as general manager and work out the terms of his employment. Do you recall whether that resolution was passed at that meeting?

A. Yes, it was.

Q. And I will ask you whether there was any other resolution about the employment of Mr. Held other than that passed at that meeting?

A. I believe not.

Q. I will ask you whether the Board of Directors came to any agreement about the employment

(Testimony of D. O. Essley.)

of Mr. Held other than expressed in that resolution.

A. I think there may have been some discussion relative to the compensation only.

Q. But you did agree on it or anybody agreed on it?

A. They were not bound to any particular figure that I remember of.

Mr. Trask: I object to the witness' answer that they were not bound as not responsive.

The Court: I don't know who he means by they.

Q. Did you agree to any term of employment for Mr. Held there at that meeting? [188]

A. No.

Q. And did you agree to any employment of him in any way contrary to the bylaws?

A. I don't think so.

Q. And then when you authorized Mr. Smith and Mr. Wahmsley to employ him and work out the terms of the employment, did you in any way agree or bind them as to what the terms of the employment should be?

Mr. Trask: Just a minute. Object to counsel's question. All of them are leading and suggestive.

The Court: Every one.

Q. Did you state or agree that Mr. Smith and Mr. Wahmsley could make a contract for three years?

Mr. Trask: Same objection.

The Court: Same ruling. This witness was present. Let's have him tell us what was talked about there.

Testimony of D. O. Essley.)

Q. Will you go ahead and tell us what your best remembrance is of how it came up and how you delegated this to Smith and Wahmsley.

A. I think we had some discussion regarding compensation. That is all I remember of, but no specific figures were set.

Q. Why did you delegate it to Smith and Wahmsley? [189]

A. Because we thought they could deal with him better than the whole board. The whole board wouldn't get together and deal with him very well. It was easier done to have a couple of men go and talk with him.

Q. After Mr. Smith's death, when were you elected as president of the two companies?

A. I believe about April 3.

Q. When did you first see a copy of this contract which is in evidence as Plaintiff's Exhibit 1?

A. I don't remember the date. It was a little time after that that I had seen a copy of that.

Q. Well at that time did you have any knowledge that they had not consulted Mr. Wahmsley about it? A. No, I did not.

Q. When was it you first discovered that Smith and Held hadn't consulted Wahmsley about this?

A. I don't remember the date. It was some little time after that, however.

Q. Do you remember the directors meeting that they termed an informal meeting which was held March 27, 1952? Do you remember the informal

(Testimony of D. O. Essley.)

meeting that was held on May 27, 1952, what they called an informal meeting? [190]

A. Yes, I do.

Q. Who called that meeting?

A. I think that I was responsible for that meeting.

Q. And I will ask you whether, if you know, Mr. Knox's home was phoned about it to give notice of it?

A. I couldn't say, of course. I understood it was, but I don't know.

Mr. Trask: May the answer be stricken?

The Court: It may be.

Q. Did you direct——

The Court: It wouldn't make any difference.

Q. When with respect to that meeting was it that you first discovered that Mr. Wahmsley hadn't been consulted in the formulation of this contract?

A. Well, I think along about that time I had learned something about that.

Q. Well, now after you were elected as president of the Board there as you say, about April 3, were you able to find from then on to what extent were you able to find Mr. Held there on the job?

A. Well, I didn't see him very many times, [191] maybe two or three times during the time he was there.

Q. And how often would you be there?

A. Something like——

Q. How many times a week?

A. Two or three times a week.

testimony of D. O. Essley.)

Q. And then when he left for the east, as he did, about May 25, I will ask you whether he notified you that he was going out of town?

A. No, I didn't know about that.

Q. And did you try to see him right the next day?

A. I think it was the next day I was in there.

The Court: Did you know he was out of town?

The Witness: No, I didn't know.

The Court: All right. We will suspend until 1:00 o'clock.

(Whereupon, the regular noon recess was taken.) [192]

D. O. ESSLEY

assumed the stand and testified further as follows:

Direct Examination

(Continued)

by Mr. Laney:

Q. Now, Mr. Essley, you heard the testimony of Mr. Knox to the effect that at this board meeting of March 6, 1952, Mr. Held stated that he would consider the job as manager on an unconditional 3-year term. Did you hear any such statement made at that time? A. No, I did not.

Q. You heard the testimony of Mr. Knox to the effect that they agreed there at the board meeting that Smith and Wahmsley could employ him for a period anything up to well, a period of three years

(Testimony of D. O. Essley.)

in any percentage up to 5%. Did you hear any such agreement at all?

A. I didn't quite get your question.

Q. You heard the testimony of Mr. Knox to the effect that at this particular board meeting, March 6, 1952, it was agreed by the board members that Mr. Held would be employed for three years. Was there any such agreement?

Mr. Trask: Object to the form of [193] the question. I don't believe that is the testimony. He repeatedly asked if he agreed and he said they didn't disagree. I think that was the testimony all the way through.

Q. Was it in any way stated that that was to be the term of employment there?

A. I think not.

Q. Was it in any way stated there that anything up to 5% of the net would be agreeable?

Mr. Trask: Object to the question as leading.

Mr. Laney: We are proving a negative, if it please the Court. We are asking him if that was said.

The Court: He was there. He ought to be able to tell it.

Mr. Laney: Now, we are proving what wasn't said.

The Court: Well all right, go ahead. Was it discussed, this matter of percentage, between you?

The Witness: Yes.

The Court: What was said about it?

The Witness: Well nothing definite.

Testimony of D. O. Essley.)

The Court: I know, but what was said? [194] What is your conclusion, whether it was definite or not, tell us what was said about it.

The Witness: I think that something was said about \$8,000 and something said about maybe \$7,000, something about \$10,000 and something about 2% after the first year and might have been something said about 5%, but I think that these two men who were delegated to negotiate with Mr. Held—I think they were given no specific instructions as to just what it was to be.

Q. Now, at the time of this meeting of June 9, 1953, did you vote for this resolution declaring Mr. Held's purported employment at an end? Just whether you did or did not vote in favor of it.

A. Of course I happen to be the chairman.

Q. You didn't vote. Well, now will you state why you were, if you were, in favor of declaring his employment at an end?

A. Yes, I favored that.

Q. Why?

Mr. Trask: Object, if the Court please. No bearing on the issues here.

The Court: Oh it may, go ahead. You may answer.

A. I just didn't think that Mr. Held was the man that we wanted. Nothing personal against him, but I [195] just didn't think that he was the man that we needed for the place, didn't think he was doing the job that we wanted done.

(Testimony of D. O. Essley.)

Q. What did you notice as to whether he was there on the job or taking any interest in it?

Mr. Trask: Again I object to counsel's leading the witness.

The Court: Yes.

Q. I will ask you to state about how often you were there at the plant during this 2½ months—2 months and 20 days that Mr. Held was there?

A. I think on an average of probably 2 to 3 times a week.

Q. How many times did you ever see Mr. Held there aside from the 3 board meetings that have been testified to?

A. I believe not to exceed 3 times.

Q. I will ask you whether anyone knew where he was?

Mr. Trask: Object to the form of that question.

The Court: Well, somebody knew; he himself, I guess.

Q. Did you make any inquiry to try to find out where he was? [196]

A. Yes, I asked at times where he was.

Q. Could you find out? A. No.

Q. And whom did you ask? Whom did you ask as to where he was?

A. The secretary, our assistant secretary.

Q. Did you ever talk with the telephone operator about it or not?

Mr. Trask: Object to it, leading.

The Court: Yes.

Q. You heard the testimony of Mr. Held that

Testimony of D. O. Essley.)

During some week he was calling on the board members. Did he ever call on you at your farm?

A. Yes.

Q. How many times did he call?

A. I believe about 2 times.

Q. And what did he talk about?

A. Well, I think his first visit was just more or less a friendly call. Then on his second visit we were discussing something with regard to the fertilizer plant and also with regard to employing a man to head the fertilizer department.

Q. And when was that, about, with respect to when he first came there on April 1, as near as you can figure? [197]

A. Well, I think the first visit was not too long after the 1st of April. The second must have been long in May. I don't recall the date.

Q. I will ask you to state about how many times you tried to find Mr. Held there at the place of business or the plant and were unable to?

A. Oh, maybe once or twice.

Mr. Laney: You may take the witness.

Cross-Examination

by Mr. Trask:

Q. Then as I understand it, Mr. Essley, at the meeting when you determined that you were going to vote to terminate his contract you just decided that you had had a change of mind as to whether he was the right man or not. That is your position, is it not?

A. Very largely true, I think.

(Testimony of D. O. Essley.)

Q. With respect to the legality of this contract did you testify that you first saw this contract shortly after March 6, 1952?

A. No, that was in April, probably the 10th, 15th of April, something like that when I first saw it.

Q. That was the first time you had seen the contract?

A. Yes, might have been a little earlier than that.

Q. Might have been around the 1st of [198] April, sometime?

A. Probably not before the 10th.

Q. And did you make any objection to the contract at that time?

A. No, I don't know that I did.

Q. You were then the president of the corporation? A. That is right, after April 3.

Q. Was Mr. Wahmsley at the meeting at which he was authorized as you testified to participate in the negotiations and work out the details?

A. I think maybe he was at the beginning of the meeting but was excluded before the action with reference to the particular question came up.

Q. In other words, your testimony is that your best memory of it now is that he was discussed before the action was taken authorizing him to participate in the negotiations? A. Yes.

Q. You were president at that time?

A. Yes.

Testimony of D. O. Essley.)

Q. Did you ever take any steps to inform him that he was one of the ones to negotiate?

A. I don't know that I did.

Q. Did you instruct anyone else to—— [199]

A. I believe not.

Q. If you were depending upon him to do it didn't you think it was important to see that he did know that he was supposed to?

A. Might have been.

Q. But you didn't take any steps to do so?

A. No.

Q. You knew that when Mr. Held came there that he was coming there to undertake the employment on a contract of some kind, did you not?

A. I knew nothing about his contract. Of course I wasn't in the place of president at that time and we were sort of leaving that up to Mr. Smith and Mr. Wahmsley.

Q. Well, after you became president did you take any steps to find out?

A. No, that had already been done.

Q. Now with respect to the manner in which he performed this contract, you say that you were in the co-op, you would say, around 2 to 3 times a week? A. I would say that is about correct.

Q. You weren't there always on official business as president, sometimes you were there as a customer of the store to buy things, is that not [200] correct? A. That is right.

Q. So you don't mean to tell the Court each time you went there you went to Mr. Held's office, some-

(Testimony of D. O. Essley.)

times you were in and out as a customer of the place, were you not? A. That is right.

Q. Well now, how many times that you went there did you actually go back and try to find Mr. Held?

A. Well, I usually came in sight of his office. I could have seen him if—I could have seen him.

Q. If he had been at his desk you could have seen him, you think? A. Yes.

Q. There were a lot of other places he could have been other than right at his office, isn't that right? A. That is right.

Q. Any of those times he could have been on company business or tending to his business, could he not? A. Probably could.

Q. You don't mean to tell the Court simply because you didn't see him at his desk he wasn't [201] tending to his duties as manager of the corporation, do you?

The Court: I don't see why you are laboring this point. He said a minute ago he only tried once or twice to find him when he couldn't find him.

Mr. Trask: I believe that is all.

Redirect Examination

By Mr. Laney:

Q. Did you learn from the other employees whether he was there on the job?

Mr. Trask: Same objection heretofore made.

The Court: Same ruling.

Testimony of D. O. Essley.)

Q. Counsel brought out from you that you first saw the contract, this contract, sometime along about April 4 I think you said, and that you didn't make any objection to it then. I will ask you whether you knew at that time that Mr. Wahmsley had not been consulted in formulating the contract?

A. No, I did not.

Mr. Laney: That is all.

Recross-Examination

by Mr. Trask:

Q. Didn't you exercise some judgment of your own when you read it as to whether it was proper or improper? [202]

A. Well, I wasn't very competent to pass on legal phases of that and inasmuch as the contract had been put through the man was on the job, I didn't pay a whole lot of attention to it.

Mr. Trask: That is all.

Mr. Laney: That is all.

I. F. COLLIER

called as a witness by and on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

by Mr. Laney:

Q. What is your name, please?

A. I. F. Collier.

Q. What is your business, Mr. Collier?

A. Well, I guess I am a farmer.

(Testimony of I. F. Collier.)

Q. I will ask you whether you have any connection with the two co-operatives that are named as defendants in this case? A. Yes.

Q. What connection?

A. I am a member of both boards and secretary of the United Producers and Consumers Co-op.

Q. And who is the assistant secretary of United Producers and Consumers?

A. Pauline, we call her. Mrs. McInerney. [203]

Q. Now I will ask you whether you were present at the meeting of the Board of Directors there held on March 6 of 1952, the one in which some resolution about employment of Mr. Held was passed?

A. I was.

Q. Now at that meeting of the Board of Directors did Mr. Held at any time state that he would consider accepting the job of manager only on a 3-year term?

Mr. Trask: If the Court please, I continue to object to leading questions and request the witness be permitted to testify.

The Court: Yes.

Q. You heard the testimony of Mr. Knox to the effect that Mr. Held said that he would only consider the job of manager on a 3-year term. Did you hear that? A. I did not.

Q. You heard Mr. Held's testimony about that, did you, here?

A. I didn't hear anything of that kind mentioned, no.

Q. That is at the meeting you didn't hear any-

Testimony of I. F. Collier.)

ning of that kind mentioned? A. No. [204]

Q. Was there some discussion at that meeting
r any discussion about any term of employment
f Mr. Held, any length of employment?

Mr. Trask: Same objection, leading and sug-
gestive.

The Court: Well, he has asked him whether
ere was any. Go ahead.

A. Yes, there was some discussion on the em-
ployment of Mr. Held, yes.

Q. What was said in that discussion?

A. Well, as I remember it got quite—we was
discussing it on all sides. You would have to be a
renographer to say what was said. If I am per-
mitted, that was the reason that we appointed 2 men
o work out terms with Mr. Held.

Q. Well now, was there any agreement made
ere other than this resolution to appoint Mr.
Smith and Mr. Wahmsley to work out the terms
nd to employ him? A. There was not.

Q. Did you hear the testimony of Mr. Knox
hen he was testifying here? A. Partially.

Q. Did you hear his testimony to the effect that
ere were instructions given to Mr. Smith and
Mr. [205] Wahmsley that they could go to \$10,000
r 5% of the net? Did you hear his testimony about
hat? A. Yes.

Q. Well, did that happen?

A. Not to my knowledge, no.

Q. Were you there all the time? A. I was.

Q. Now was there any agreement reached there

(Testimony of I. F. Collier.)

as to the basis of compensation?

Mr. Trask: Same objection, leading and suggestive.

The Court: Oh, go ahead.

Q. Was there? A. There was not.

The Court: What were these 2 men appointed for? Why were they appointed? What were they supposed to do?

A. Well, the board seemed to be kind of unable to agree on any one thing. I don't know how many there were, 6, 7 or 8—10, I guess, and I moved that they appoint the 2 men, Mr. Wahmsley and Mr. Smith, to work out terms with Mr. Held.

The Court: Then that authority was delegated to those 2 men?

The Witness: That is right. [206]

The Court: To do that?

The Witness: That is right.

The Court: And they did it?

The Witness: Mr. Smith.

The Court: There is a question whether Mr. Wahmsley did. Mr. Smith did. All right.

Q. Were you present at the meeting of June 20, 1952, when there was some resolution terminating the employment of Mr. Held? A. I was.

Q. I will ask you whether you voted in favor of that. Did you vote in favor of that resolution?

A. Sure, yes.

Q. I will ask you to state why you came to that decision?

A. For the simple fact that as far as my way

Testimony of I. F. Collier.)

Q. Looking at it, Mr. Held wasn't tending to any part of the business there as manager of the co-op.

Q. Go ahead and explain that further.

A. Well, he was to my knowledge never there.

Q. How often would you be there?

A. I would say from 3 to 5 times a week.

Q. And could you find him there? [207]

A. I saw him there 2 times in the 2 months and 10 days that he was paid for services.

Q. I will ask you whether he had left word with anyone as to where to find him?

Mr. Trask: Object to the form of the question. He has asked whether he left word with anyone.

The Court: Yes.

Q. Did you make inquiries to try to find him?

A. I did.

Q. And could you find out?

A. I couldn't find out nothing.

Q. Did you know the girl that was his secretary or supposed to be his secretary there?

A. I suppose I did, but not—I couldn't point her out right now.

Q. Did you make any inquiry of her as to where she was?

A. I don't think so. If I might ask a question here, was she supposed to have been in Mr. Held's office or not? I never did see her there.

Q. You didn't see her there? A. No.

Q. Whom did you inquire of?

A. Oh, I inquired of the telephone girl, [208] the different heads of departments, Pauline, for

(Testimony of I. F. Collier.)

instance, quite a number of them around, I don't know. Being in there once in a while I couldn't understand why we were paying \$10,000 a year for a man nobody could find or never see.

Q. You heard Mr. Held's testimony about he was around visiting the directors. Did he ever come to visit you?

A. No, not to my knowledge. He never found me, anyway.

Q. Well, where were you at the time?

Mr. Trask: At what time?

Q. During the time from April 1 to June 20 of 1952.

A. I was on the ranch and in town here.

Q. Were you ever able to see where Mr. Held was in any way giving any directions or trying to manage the business?

Mr. Trask: Object. That calls for a conclusion not based on any statement of fact or foundation in fact.

The Court: Yes.

Mr. Laney: That is all.

Cross-Examination

By Mr. Trask: [209]

Q. Mr. Collier, with respect to the board of the United Producers and Consumers, how long have you been on that board?

A. Well, ever since it was organized. Ever since the co-op was organized. I can't recall what year that was.

Testimony of I. F. Collier.)

Q. Around '34, something like that?

A. Possibly.

Q. And as a matter of fact most of the members who were originally on the board are still on the board?

A. No, I don't think so.

Q. Who were the original members of the board, Mr. Collier?

A. That is rather hard for me to say. Jack Lick. A man—has been dead a number of years, can't recall his name.

Q. May I help you? Incorporators of United Producers and Consumers were W. S. Dorman, S. S. Click, I. F. Collier, D. O. Essley and W. L. Smith.

A. That is right.

Q. Except for Mr. Smith, who passed away in March, March 25, 1952, all of those men are still on the board of the United Producers and Consumers, are they not? [210]

A. No, Mr. Dorman is not.

Q. Mr. Dorman is not?

A. No. Pardon me, can I ask the question who was the man that passed away? What was his name?

Mr. Laney: We can find out.

Q. Other than the man who passed away and Mr. Smith who passed away, the membership of the board has remained pretty much constant, has it not, Mr. Collier?

A. Well, yes and no.

Q. Mr. Dorman is a man who is practically retired now and lives in San Diego, does he not?

(Testimony of I. F. Collier.)

A. No, I think he is dead.

Q. Has he passed away? I didn't know that.

Q. Well, other than that then, the membership of the board of the United Producers doesn't change very much. They are re-elected for 3-year terms, are they not?

A. There has been some opposition, yes.

Q. Now with respect to the contract, when did you first see the contract, Mr. Collier?

A. I think it was the day we passed a resolution to discharge Mr. Held.

Q. That was June 20? [211] A. Yes.

Q. You had never taken a look at the contract prior to that time?

A. Didn't know there was one existing.

Q. What did you think the meeting was for at the time Mr. Smith and Mr. Wahmsley were delegated to negotiate with him?

A. We had never had a contract with a manager.

Q. I know, but what were you delegating them to do? What did you think you were doing when you were delegating them?

A. To make an agreement with Mr. Held.

Q. Then you just didn't think it would be put to writing, is that what you mean to say?

A. That is right.

Q. You had never inquired about it?

A. No.

Q. Did you ever take any steps to inform Mr. Wahmsley he was supposed to participate in that?

Testimony of I. F. Collier.)

A. I found out whether or not that he had been notified, yes.

Q. When did you find that out?

A. When did I find it out?

Q. Yes. [212]

A. Immediately in the next few days after the meeting.

Q. After what meeting?

A. The meeting when he was appointed to assist Mr. Smith in the formulating of this agreement.

Q. In other words, a few days after the meeting of March 6 at which time Mr. Wahmsley authorized, did you tell Mr. Wahmsley that he was authorized to help negotiate the contract?

A. I wouldn't say I told him, no. I asked him if he was notified of it, yes.

Q. So you discussed it with Mr. Wahmsley a few days after March 6 and it was your understanding that he knew that he was one of the ones who was authorized? A. Yes.

Q. Absolutely?

A. I wouldn't say absolutely, no, but I am quite sure that he knew that he was.

Q. Knew that he was authorized to participate?

A. I wouldn't say about that for sure because those things, I don't keep a record of all those things.

Q. Now as to whether or not Mr. Held was attending to business you say you were at the co-op around 3 or 5 times a week? [213]

A. That is right.

(Testimony of I. F. Collier.)

Q. By the way did you as a member of the Board of Directors or any of the members of the Board of Directors ever give Mr. Held any directions as to how he was to acquaint himself with the duties of manager and the business of the company and the area in which he was working? Did you ever give him any specific instructions whether from the outside in or inside out?

A. Never had any chance to.

Q. You saw him at board meetings?

A. Twice—2 times, in the 2 months that he was there.

Q. You attended board meetings, didn't you?

A. Yes.

Q. Mr. Held was at board meetings?

A. Yes.

Q. Did you ever give him any instructions at board meetings as to how you expected him to conduct himself specifically?

A. I can't say that I personally did.

Q. And neither did anyone else at the board meetings at any time make any complaint about the manner in which he was operating, did they, Mr. Collier? [214]

A. Well, it wasn't necessary.

Q. You didn't think it was necessary?

A. No.

Q. You say you made inquiries of him about his whereabouts and didn't find out where he was. Did you ever take any occasion to ask somebody, to have him get in touch with you? Did you ever leave word there you wanted him to get in touch with you?

A. No, I don't think so.

Testimony of I. F. Collier.)

Q. Did you make any investigation to see what he was doing when he wasn't in your sight, as you say, when you went in the building? A. I did.

Q. Did you find out where he was?

A. Nobody knew.

Q. I believe you have already testified you never asked his secretary?

A. I didn't know he had a secretary.

Mr. Trask: That is all.

Redirect Examination

by Mr. Laney:

Q. You say you did not see this written contract until this meeting of June 20, is that correct?

A. That is right.

Q. And did you have any knowledge that [215] Mr. Wahmsley had not been consulted in formulating the contract?

Mr. Trask: Just a minute.

Q. (Continuing): —until that time?

Mr. Trask: That is leading and suggestive and attempting to impeach his own witness on his own testimony.

The Court: Yes.

Q. When did you first learn that Wahmsley had not been consulted in the formulation of this contract?

A. I couldn't say about the dates, but it was long after we become very much dissatisfied with Mr. Held's service. At that time I began to inquire.

Mr. Laney: That is all.

Mr. Trask: No further questions.

EMIL ROVEY

called as a witness by and on behalf of defendants,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Emil Rovey.

Q. And what is your business?

A. Dairy farmer, dairy and poultry, farming in Glendale.

Q. And I will ask you whether you are a [216] member of the Board of Directors of these 2 corporations that are defendant here?

A. I am on the board of the Southwest for about a year and a half. I have just recently been on for a year and a half or 2 years but I am one of the new members on that board.

Q. On the Southwest Co-Operative Wholesale?

A. That is right.

Q. You are not on the other board?

A. I am not on the United.

Q. Now I will ask you whether you were present at the meeting of June 20, 1952, when there was some resolution to declare Mr. Held's employment at an end?

A. Yes, sir, I was.

Q. I will ask you whether you voted to terminate that employment?

A. I did so vote.

Q. I will ask you to state what the facts are as to why you did that?

A. Well, from the various times that I have

Testimony of Emil Rovey.)

When I went down at the co-op normally I would get down there about twice a week. I had never seen Mr. Held at the co-op. Previously our other manager, who would always step in the office, say hello or how is everything going. [217] It was different when Mr. Held took over and pretty soon we got to wondering what he was actually doing. The other thing is the field men, the different men coming out in the country would ask me where is Mr. Held, they haven't seen him, the various departments. They haven't seen him or he hadn't been in the different departments, so piecing everything together we wondered whether he was on the job and how much of the time he was actually on the job and what he was doing and therefore we more or less came to the conclusion that if he wasn't taking interest in the co-op it was time that we do something and make a change.

Q. Well now, when did you first see this contract that is in evidence as Plaintiff's Exhibit 1? That is the contract of employment?

A. I don't think I ever did see the actual contract. It was at this last meeting that it was brought out, but as far as actually reading the contract I did not.

Q. Well, were you present at the meeting of March 6, 1952, at which there was some resolution about employing Mr. Held?

A. Yes, sir, I was.

Q. And I will ask you whether there was any agreement there other than the resolution that [218] was passed?

(Testimony of Emil Rovey.)

A. No, I think not. There was no other particular agreement. There was discussion of various types and it is hard for a whole board to get together to work out the terms of employment, so it was decided mutually among all the board members that Mr. Smith and Mr. Wahmsley would work out the contract and see that everything was signed up and all arrangements were made. It was left up to those 2 men to do that.

Q. Well now, did you hear the testimony of Mr. Knox to the effect that Mr. Held at that meeting said he wouldn't consider being manager unless he was given an absolute 3-year term? Did you hear that testimony of Mr. Knox?

A. No, I wasn't here, I am sorry, this morning.

Q. Well, was there any such statement that you heard at this meeting of March 6?

A. That he wouldn't accept the job without a 3-year contract?

Q. Yes.

A. As far as my recollection, no, I can't remember that he specifically said that he would not accept the job without a 3-year contract.

Q. Was there any agreement arrived at as [219] to any definite employment, any definite number of years?

A. No, as far as I remember we left that up for Walter Smith and Mr. Wahmsley to work out the terms of employment. I think that was left up to those two gentlemen.

Q. Was there any agreement by the board there

Testimony of Emil Rovey.)

With Held arrived at as to the measure of his compensation, his pay?

A. No, I think that was left up entirely to the discretion of these two men.

Q. Did Mr. Held call on you as a member of the board?

A. Yes, sir, he did. He was out at my ranch two different occasions. The first time shortly after he had arrived there he came out to the ranch. As I remember, we went through our new dairy barn out there and it was a very friendly sort of a visit. He told me he was contemplating a trip over to California, Blythe and that area, and on the second time he was out to the ranch was I think after he had received this wire questioning the legality of the contract and I told him I didn't know too much about it, to go see Mr. Essley, but that is about the extent of the contacts.

Q. You are referring to that wire that was [220] sent on May 27?

A. Yes, sir. That is after he had come back from Iowa.

Q. Will you give some idea of how large an operation these two companies make there, how many departments are there, about?

A. Well, there is fertilizer and insecticide, there is lumber, there is the feed department, there is the furniture department, the petroleum department and the hardware. I think that comprises most of them.

Q. You spoke something about the prior man-

(Testimony of Emil Rovey.)

ager. What was he accustomed to do in managing the business?

Mr. Trask: Object. Irrelevant.

The Court: Yes.

A. Well, from my previous experience——

Mr. Laney: No, the Judge said no. You may take the witness.

Cross-Examination

By Mr. Trask:

Q. Mr. Rovey, you got to wondering, as I understood you, whether or not Mr. Held was interested in the job and whether he was occupying himself on the company affairs, is that what concerns [221] you? A. That is right.

Q. That is the principal thing that worried you, is that right?

A. Well, I was worried that he wasn't doing the necessary job as manager, that he wasn't taking interest. In my estimation as manager in as big a concern with all of those different various departments the manager is certainly going to have to spend a good deal of his time especially getting acquainted with the job at the job.

Q. Now did you ever talk to Mr. Held about that? A. Did I talk with him about it?

Q. Did you ever talk with Mr. Held about it?

A. No, sir.

Q. Did you ever go to Mr. Held and find out what he was doing?

A. Well, I went to the co-op. Like I say I was

(Testimony of Emil Rovey.)

ere a number of different times. I could never
nd him at his office, there was never a time that
had a chance to talk with Mr. Held at his office.
e was never at his desk when I was there.

Q. Did you ever leave word that you wanted to
et in touch with him?

A. Not particularly. [222]

Q. When he was out to the ranch, to your
anch—did he *out there* at any time?

A. Well——

Q. Let me ask the question, did you ever make
ny effort when you were wondering whether Mr.
eld was performing his duty did you ever make
ny effort to go to get in touch with Mr. Held to
t down and find out what he was doing when he
asn't doing what you thought he ought to be doing
nd talk the situation over with him?

A. Well, naturally as a farmer we are pretty
usy in our own business first of all and normally
y duties——

Q. I would like to have you answer the question,
id you or did you not ever make an effort to get
a touch with Mr. Held to find out why he wasn't
oing what you thought he should be doing?

A. I intended to if I could have found him at
ne office.

Mr. Trask: That is all.

Mr. Laney: But you couldn't find him?

The Witness: He was never there.

Mr. Laney: That is all.

RALPH ASHBY

called as a witness by and on behalf of defendants,
being [223] first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Ralph Ashby.

Q. I will ask you whether you were a member of the Board of Directors of the Southwest Co-Operative Wholesale? A. I am now, yes.

Q. And were you a member of that board on March 6, of 1952?

A. The first day I became a member of the Southwest.

Q. Then I will ask you whether you are a member of the United Company? A. Yes.

Q. How long have you been a member of that?

A. October, 1951.

Q. I will ask you whether you were present at the meeting of the Board of Directors of March 6, 1952, at which there was some resolution passed concerning the employment of Mr. Held?

A. Yes.

Q. And were you present during the testimony of Mr. Knox here? [224] A. Yes.

Q. Did you hear the testimony of Mr. Knox to the effect that Mr. Held at that meeting stated that he would not take the job of manager unless he was given a full 3-year term? Did you hear Mr. Knox's testimony about that? A. Yes.

(Testimony of Ralph Ashby.)

Q. Is that correct? Is that your remembrance?

A. No.

Q. Did Mr. Held make any such statement there at that meeting? A. No, not at that meeting.

Q. And then did you hear the testimony of Mr. Knox to the effect that it was agreed there that Mr. Smith and Mr. Wahmsley would have authority to make a contract up to \$10,000 a year and up to 5% of the net or something? Did you hear his testimony about that?

A. Hear Knox's testimony?

Q. Yes. Well, is that correct? Was any such agreement arrived at? A. No.

Q. Well now, what was your purpose in delegating this to Smith and Wahmsley to work out the contract?

A. Well, Wahmsley was our auditor, we [225] figured he was capable of making out a contract with him, and Mr. Smith being the president of the company we figured he would be the man, the two of them should work it out together.

Q. Well now, when was it that you first became aware of the claim that Mr. Wahmsley had not been consulted in the formulation of this contract? When did you first become aware of that?

A. Not until the night of that meeting of May 27.

Q. Meeting of May 27. And when Mr. Held was here in the employ up to that time, up to May 27, did you have any knowledge of the fact that Mr.

(Testimony of Ralph Ashby.)

Wahmsley had not been consulted or concurred in the making of this contract?

A. Not up until May 27.

Q. Now were you present, Mr. Ashby, at the meeting of June 20, 1952, at which there was some resolution relative to terminating Mr. Held's employment? A. Yes.

Q. Now did you vote for that in favor of that resolution? A. Yes.

Q. Now I will ask you to state the facts as to why you wanted to terminate his employment. [226]

A. Well, every time I had been out to the co-op I had more or less made it a practice to go back and say hello, but I never could find him in and I just figured that he was out to the other departments and so when I would be over to the feed mill or in the lumber yard I would say "Well, how is the new manager making out?" "Well, I don't know, I haven't seen him." And so many of them had never met him that I got to inquiring around to the other departments, then we will know he hasn't visited that department and I figured well he just isn't on the job.

Q. And about how often would you come there? How many times a week?

A. Well, I didn't come very often, probably 3 or 4 or 5 times a month.

Q. And when you were there were you ever able to find him in—find him at the plant?

A. No, not when I would come in, no.

Q. I will ask you to state in a general way the

Testimony of Ralph Ashby.)

ature of the business and what is required in order
o manage that business.

Mr. Trask: Object. Calls for a conclusion,
pinion.

The Court: Yes.

Mr. Trask: Not proper. [227]

Mr. Laney: You may take the witness.

Cross-Examination

By Mr. Trask:

Q. Mr. Ashby, when you were in there 3, 4 to 5
times a month, you say, how many of the times did
ou see him there?

A. I didn't see him at all.

Q. That would be then you were there 3 or 4
times you would say during the month of April and
or 4 times during the month of May?

A. Yes.

Q. So you had an opportunity, you were in there
about 6 times maybe, something like that, during
that 2-month period, and how long would you stay
here at a time when you would go in?

A. Probably an hour to 3 hours.

Q. And did you ever leave word that you wanted
o get in touch with him? A. No.

Q. He did take enough interest, he came out to
our place to see you, didn't he?

A. He came by, yes.

Q. You don't testify to the Court the times you
didn't see him there that he wasn't on company
business, do you, Mr. Ashby? [228]

(Testimony of Ralph Ashby.)

A. Oh, no.

Mr. Trask: That is all.

Redirect Examination

By Mr. Laney:

Q. When was it that he came out to see you?

A. Along the middle of April, I guess. He was there about 30 minutes.

Q. What did he talk about?

A. He just asked me about the farm, just a few questions like that.

Q. Did he ask you anything about the business that he was supposed to manage? A. No.

Q. Just sort of get-together meeting?

A. Just a get-acquainted meeting, is all.

Mr. Laney: That is all.

Recross-Examination

By Mr. Trask:

Q. Did you ever give him any instructions as to how you thought he should conduct the business of manager?

A. No, I thought he should know that.

Q. But when he didn't do that the way you thought he should you never gave him any instructions as to how you thought he should vary from what he was doing, did you? [229]

A. Not that I know, no.

(Witness excused.)

PAUL HUNT

called as a witness by and on behalf of defendant,
being first duly sworn, testified as follows:

Direct Examination

by Mr. Laney:

Q. What is your name, please?

A. Paul Hunt.

Q. What is your occupation?

A. I am in the furniture department, supervisor.

Q. In other words, are you the head of that department?

A. Yes, sir.

Q. Were you in that capacity at the time when Mr. Held first came there on April 1, 1952?

A. Yes, sir.

Q. And were you in that capacity continuously from then up until June 20 at the time that his employment was terminated?

A. Yes, sir.

Q. What was your business and duties in that department? Just in a general way.

A. Just as a supervisor of the department [230] to see it operated properly, is all.

Q. And in a general way how large a business, how much overturn annually—sales?

A. I would say, well, run around \$20,000 a month.

Q. And how long have you been employed by the company?

A. Since '41.

Q. Your employment is by United, is it, or Southwest Co-Operative Wholesale—which pays you?

(Testimony of Paul Hunt.)

A. I get my check from United Producers.

Q. When did you first meet Mr. Held and under what conditions?

A. I wouldn't know what date, but Mr. Held came in to see me in the store.

Q. What did he come in for?

A. I imagine he came in to introduce himself, which he did. Then he asked about furniture for his new home.

Q. And what further did he do about that?

A. We discussed various pieces he might like. Then he made mention he might want to see, his wife to see them when she came to Phoenix with the family which I never got to see.

Q. Was anything discussed about a [231] catalog?
A. Yes, sir.

Q. What was done?

A. We ordered a catalog and it was in regard to some rattan furniture which we received.

Q. Did he ask you anything or make any suggestions about the running of the business?

A. No, sir.

Q. And how many times did you see him all told during this a little over 2½ months he was there?

A. I know personally I met him twice in the store, I know for sure.

Q. On either of those times did he make any suggestions or ask anything about the running of the business?

A. I don't think he came in purposely for that. I think he came more or less on business.

Testimony of Paul Hunt.)

Q. Did he make any suggestions or ask anything? A. No, sir.

Q. On the second time that he came in there that was the subject of the discussion, if you remember? A. It was still furniture.

Q. Still furniture for himself?

A. Yes, sir. [232]

Q. Did he ever give you any directions or instructions as to what to do?

A. We never got down into that, really.

Q. What?

A. We never got down to discussing the business.

Q. Did he ever come and inquire into or show any interest in the running of that business?

Mr. Trask: Object. Calls for a conclusion.

Q. Did he make any inquiries about the business? A. Not about the business.

Mr. Laney: Take the witness.

Cross-Examination

By Mr. Trask:

Q. Mr. Hunt, the way the setup is out there you are in charge, you say, of the furniture department? A. That is right.

Q. How much of the time are you there?

A. I am there every day from 8:30 to 5:30 except one day a week. Every other week later. One day every other week.

Q. Is there somebody that is in charge of [233]

(Testimony of Paul Hunt.)

the several departments of the furniture, the hardware, and the lumber, and so forth?

A. That is correct.

Q. Who is that?

A. The one in charge of the lumber.

Q. No, isn't there Mr. Huber that is in charge of the coordinating of the several different departments?

A. Mr. Huber I would say is in charge of quite a few departments, an overseer, perhaps. I wouldn't know what his capacity is, I never have been told.

Q. Well, he oversees the furniture department to some extent?

A. He does our buying for us.

Q. And oversees some of the department operations, does he not?

A. It is up to me entirely to see—all he does for me is does our buying.

Q. And do you know at the time Mr. Held came in there about twice and talked to you about his own furniture?

A. Well, I was there personally, yes.

Q. Do you know whether he was in there other times when you weren't there?

A. I was never told whether he was or not. [234]

Q. You have been employed there since '41?

A. Correct.

Q. Did you ever attend any staff meetings, the heads of departments?

A. This was one meeting called while Mr. Held was there and I presume they were mostly depart-

Testimony of Paul Hunt.)

ent heads and what was discussed was merely
ore or less to get acquainted.

Q. Did you attend that meeting?

A. Yes, sir.

Q. When was that?

A. I wouldn't know what date.

Q. Did you just attend one meeting, one staff
meeting? A. One only.

Q. And all the other heads of departments were
ere?

A. I wouldn't say they were all there, there was
t least a few there.

Q. Where was it held?

A. In the office that was formerly Mr. Martin's
fice.

Q. Where Mr. Held then had his office?

A. Yes.

Q. Did he discuss with you then or did he [235]
vite you to tell him any problems you might have
n the furniture department?

A. Not particularly about the furniture. We
discussed what we needed done to the building.

Q. And did you offer suggestions at that time?

A. That is correct.

Q. General discussion of the affairs of your de-
partment and your particular building, is that not
ight?

A. That is correct about the building particu-
arly.

Q. Didn't you attend any other staff meetings?

A. No, no other meetings besides that.

(Testimony of Paul Hunt.)

Q. That is the only staff meeting you attended?

A. That is right.

Q. You don't say there were not others held?

A. I wouldn't know if there was.

Mr. Trask: That is all.

Mr. Laney: Were you ever invited to any except this one?

The Witness: No.

Mr. Laney: That is all.

JOE HURON

called as a witness by and on behalf of defendants,
being [236] first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Joe Huron.

Q. I will ask you whether you are in the employ of United Producers and Consumers?

A. Well, not at the present time, no. I get my check from the Southwest Co-Operative Wholesale.

Q. Have you been in the employ of one or the other of these companies for a good many years?

A. Yes, sir.

Q. And when did you first start to work for them?

A. Oh, I don't remember exactly. I think about 1939—1938.

Q. And that was which company?

Testimony of Joe Huron.)

A. That was the United Producers and Consumers.

Q. Will you state what your department and duties are and were? Were you there in the employ during the time when Mr. Held was there from April 1 of 1952 until June 20 of 1952?

A. Yes, sir.

Q. During that time what was your department and the nature of your duties? [237]

A. Well, more or less operations manager, and I had charge of all maintenance, construction, and even the transportation. I had charge of the trucks and cars of the company, see that they were kept in repair.

Q. What else did you do?

A. Well, most anything that come up. If there was any trouble come up they called me. I had to get it straightened out some way.

Q. I will ask you when you first met Mr. Held as near as you can fix it?

A. I believe I met him in the insecticide department, Mr. Martin brought him over there before he was employed by the company.

Q. We will come to the matter of after his employ. Did you see him at all after his employ?

A. One time, yes, in the insecticide department. He came there and Mr. Martin started to introduce us again and made the remark that we had met earlier before.

Q. Did he ever advise you—with you or direct you about what to do in your department?

(Testimony of Joe Huron.)

A. Not very much, sir. I think I talked to Mr. Held about twice in his office about different operations in regard to the business. [238]

Q. What have you to say as to whether he was there on the job or not?

Mr. Trask: If the Court please, object. Not proper question as to this witness. He doesn't know whether he was on the job or where he was on the job.

The Court: Oh, I don't think so.

Q. Did you ever try to see Mr. Held when you couldn't? A. Many times, yes.

Q. Relate the circumstances of why you would want to see him and what you did.

Mr. Trask: May we have the foundation, time and place?

Q. Well, when as near as you can fix it—when did you first try to see him when you couldn't?

A. Well, I don't know when as far as the date and time is concerned, but there was many times that I come to the office to discuss something with him in regard to the operations of the company and he wasn't there.

Q. How many times would you say you tried to see him when you couldn't find him?

A. Numerous times.

Q. Could you give some estimate? [239]

A. I would say 15 or 20 times.

Q. Did you find out where he was?

A. I didn't delve into that, to be truthful, sir.

Testimony of Joe Huron.)

He just wasn't there and I went on about my business.

Q. State whether or not you were endeavoring to confer with him as manager about the running of your department.

Mr. Trask: Object to counsel's leading questions.

The Court: Yes.

Q. What were you trying to contact him about?

A. As I stated before it was always in reference to some operation of the company that I wanted to discuss with him or purchasing some machinery or something, something that was necessary at that particular time. We were quite busy in rebuilding our insecticide plant.

Q. Well now, did you ever try to see him about the machinery, the insecticide plant?

A. Yes, sir.

Q. And what about that? Tell why you did and whether you could see him.

A. Well, I just didn't find him, that is all. [240]

Q. Did you hunt for him and try to find him?

A. I am generally from one end of that place to the other a number of times a day in my rounds, I never did run into him.

Q. Well, at that time what was wrong at the plant?

A. Oh, nothing particularly wrong, just the fact that we were remodeling our insecticide department, getting ready for our season on insecticides.

Q. Was there anything about some mixer there that there was any difficulty about, do you recall?

(Testimony of Joe Huron.)

A. No, outside of the fact that we tried one phase of the operation, it didn't work out just right and I wanted to see Mr. Held and see if he would be in accord with putting a mixer up in place of a tank that we had, what I would call a holding tank, and at that time I found that he had gone some place over the week end or out of the state, so I went ahead and took it upon myself and I consulted with McInerney and went ahead and we decided what we would do and went ahead and done it, that is all.

Q. Did he ever make any inquiries of you or any suggestions about the running of your department?

Mr. Trask: Same objection, if the [241] Court please, leading and suggestive.

The Court: He may answer.

A. Well, as I say I think twice I discussed the operations of the plant with Mr. Held in his office. Other from that I more or less went on with my work to the best of my ability and if I had anything I wanted to talk to him about I tried to see him, if he wasn't there I just went on about my work.

Q. What have you to say as to whether he showed any knowledge or tried to acquire any knowledge of the workings of your department?

Mr. Trask: Object. Calls for a conclusion.

The Court: Yes.

Q. What did you do in your capacity there in

Testimony of Joe Huron.)

the way of production of insecticides and fertilizers, what did you do about that?

A. Well, I more or less was in charge of that phase of the operation at the time.

Q. And will you give us some idea of what an operation that was, how much in dollars and cents could you turn over in these particular months when Mr. Held was there, say April, May and June?

A. Well, not in dollars and cents I couldn't tell you, no, but in tonnage I would say possibly [242] in the first part of June we were working 3 shifts on our technical grinding around the clock.

Q. Can you give some idea, though, of the amount in dollars and cents that would be turnover?

Mr. Trask: Object to the witness testifying. He said he can't answer, not qualified.

The Court: He said he didn't know.

The Witness: No.

Q. Who, if you know, was in charge of the machinery of the feed mill and the lumber yards and the oil racks? A. Well, I was.

Q. Who was in charge of the trucks and cars used by the company? A. I was.

Q. Approximately how many trucks and cars was that? A. About 30, I would say.

Mr. Laney: You may take the witness.

(Testimony of Joe Huron.)

Cross-Examination

By Mr. Trask:

Q. Who has talked to you, Mr. Huron, about your testimony coming up here? Who talked to you about what you were going to say? [243]

A. Nobody talked to me about what I was going to say because——

Q. Who talked to you about coming up here? Who was it? A. Miss Gentry told me.

Q. Miss who? A. Gentry.

Q. Are you referring to the lady at Mr.——

Mr. Laney: You still call her by her single name—Mrs. McInerney.

Q. She was the one?

A. Yes. She called me.

Q. You are still employed there?

A. Yes, sir.

Q. Did you ever attend any staff meetings at Mr. Held's office? A. No, sir.

Q. Never attended any?

A. Only myself, myself and him.

Q. Just yourself and him?

A. That is right.

Q. You testified you went up there a couple of times and that he was down at your place how many times?

A. Once is all. After he was with the [244] company. He was there once before. He came there with Mr. Martin.

Testimony of Joe Huron.)

Q. What did he discuss with you the first time he was down there without Mr. Martin?

A. Well, as I recall I believe I explained to him the fact that we had tried out a certain phase of this operation in our technical grinding and it hadn't worked the way that we had expected it to and I believe that was after I had put another mixer—I will call it—or another tank with a screw conveyor in it up there.

Q. Did you ever leave word at his office that you wanted to get in touch with him?

A. Not particularly, no, I don't believe I did because as I say, the phase of my employment out there I am all over the place, several times a day.

Q. You have been there for a long time and that department has been running for quite a while, hasn't it, Mr. Huron?

A. That is right, about 15 years, I think—15, 16 years.

Q. Do you recall one occasion, for instance, when you testified about when Mr. Held brought a group of students from the University and had you speak to [245] them and go through your department?

A. Yes.

Q. You have forgotten that occasion, I guess.

A. No, not necessarily. That happens pretty near every year. Why should I forget or remember just one phase of it?

Q. You were just testifying as to the number of times he had been down.

A. I didn't figure that he was down there to

(Testimony of Joe Huron.)

talk to me at the time anyway or find out or learn anything about the operations.

Q. You don't know what he was doing around the plant or where he was occupying his time or how he was going about familiarizing himself with the business, do you, Mr. Huron?

A. In a sense I do, yes.

Q. Your department is the insecticide and what is it—fertilizer?

A. Insecticide, fertilizer, general maintenance, construction, transportation.

Q. Other than the times when you talked to him actually do you know what he was doing the other times? A. No, sir, I do not. [246]

Q. You don't know that he was then not on company business at the time, you didn't see him, did you, Mr. Huron?

A. No, sir, I know he just wasn't there, that is all.

Q. You know he wasn't at your department?

A. Well, my department more or less took in his territory. I was in the main store, I would say, several times every day.

Mr. Trask: That is all.

Mr. Laney: That is all.

EVERETT BARBER

called as a witness by and on behalf of defendants,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Everett E. Barber.

Q. What is your business?

A. I am manager of the lumber yard for United
Producers Consumers Co-Operative.

Q. What are your duties there? What kind of
business is that?

A. Well, we handle all types of building sup-
plies, shall we say. That is lumber, roofing [247]
materials, most material that would constitute a
building.

Q. How long have you been in the employ of
this company, about? A. Since July, 1946.

Q. When did you first meet Mr. Held?

A. I think officially the first time I met him was
when he called a meeting in his office. I don't know
just exactly the date of that meeting.

Q. You recall that he came there as manager
about April 1 of 1952?

A. That was my understanding.

Q. From that time until he ceased to be em-
ployed there on June 20 of 1952 how many times
did you see him?

A. Officially I would say 3 times.

Q. You say officially, in what way did you see
him? What was discussed?

(Testimony of Everett Barber.)

A. Well, officially—by that I mean I had seen him at a distance, but to actually talk to him I had seen him 3 times.

Q. What did he talk about and under what conditions? Let's name the first time.

A. The first time was in his office. He had called a meeting there of the department heads, so I understood. [248]

Q. And how long did that meeting last about this meeting of department heads?

A. Oh, I would say 15 minutes to half an hour, probably.

Q. 15 minutes to half an hour, and did he give you any directions as to how to run your department or discuss with you how to run it?

A. Well, the only discussion we had at that time I know he asked what corrections may be made generally in the business.

Q. You say there was one more meeting than that that you had with him, or 3—2 more?

A. There are 2 more, yes.

Q. And the next meeting, where was that?

A. At the lumber yard. We had, in this first discussion or first general meeting, talked about or at least I had brought up about the condition of one of the driveways and he came down and we discussed that.

Q. And how long did you discuss that?

A. Oh, I would say 10 or fifteen minutes, possibly.

Testimony of Everett Barber.)

Q. What was the length of his visit there at the lumber yard?

A. That was the duration at that time.

Q. Then the next time that he was there, [249] where was that meeting?

A. That was at the lumber yard also.

Q. What was the subject matter of that?

A. At that time we were discussing the possibilities of a parking lot over on the corner of 19th Street and Jackson Street where the incinerators are.

Q. Did he ever give you any directions or suggestions as to how to run the business there?

A. Those were the only things we discussed.

Q. Well then, what is your answer, did he give you any directions as to how to run the business?

A. No, sir.

Mr. Laney: You may take the witness.

Cross-Examination

By Mr. Trask:

Q. You have been running that since 1946?

A. Yes, sir. No, sir, I haven't. I will retract that statement. I have been employed there since 1946, but I was not manager all that time.

Q. How long have you been in charge of the lumber department?

A. I believe the last 3 or 4 years.

Q. But prior to that time you had been [250] in the lumber department?

(Testimony of Everett Barber.)

A. I have always been in the lumber department since 1946.

Q. You knew something about it, did you?

A. Yes.

Q. You felt you knew quite a little bit about it when you became manager, did you not?

A. Well, I won't say I thought I knew a great deal about it, I did know something about it.

Q. At least your services as manager during the past 4 or 5 years running that operation have been satisfactory to the Board of Directors and the previous manager, had they not, so far as you know?

A. Well, I hope they had.

Q. You never had too much criticism about it, things have been going along all right down at the lumber yard, had they not?

A. Yes, sir.

Q. Mr. Held didn't come in and immediately change that all around or change the routine or give any particular directions, did he?

A. We had never discussed that part of it, no, sir.

Q. Did you have any fundamental problems of management of your department that you weren't able to [251] cope with?

A. No, sir.

Q. You saw him, you say, a number of occasions out and around the place but officially only 3 times, is that your testimony?

A. That is correct.

Q. And you attended how many staff meetings?

A. One.

Q. Do you know as a matter of fact that there were other staff meetings other than the ones you

(Testimony of Everett Barber.)

attended? A. I don't know.

Q. You don't know. You found him interested in your problems when you raised them, did you not, Mr. Barber?

A. On the occasions when we discussed it, yes.

Mr. Trask: I believe that is all.

Redirect Examination

By Mr. Laney:

Q. Were you invited to any other staff meetings with Mr. Held? A. No, sir.

Mr. Laney: That is all.

HARRY PURDY

called as a witness by and on behalf of the [252] defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Harry Purdy.

Q. I will ask you whether you are in the employ of one of these companies—that is defendants here in this suit?

Q. I have been in the employ of Southwest Co-Operative Wholesale since April of 1946.

Q. What is your position now?

A. Office manager for the company.

Q. And during the time when Mr. Held was there from April 1 to June 20 of 1952 what was your position then?

(Testimony of Harry Purdy.)

A. I was head bookkeeper.

Q. And as such were you in the main office there of the company? A. Yes.

Q. Now I will ask you what had been the practice about reports and going into phases of the business and so on in the past there?

Mr. Trask: Objection. Has no bearing on this inquiry.

The Court: I don't see where it [253] could.

Q. I will ask you whether Mr. Martin—whether Mr. Held while he was manager there ever gave you any directions or made any inquiries about your department?

A. No, outside of being introduced to him he never spoke to me.

Q. I will ask you whether you kept records of time that the employees worked and records on the efficiency of the employees?

A. Yes, we kept a complete time sheet and individual records of employees.

Q. I will ask you whether he ever made any inquiry there about those records of employees?

A. Not to my knowledge.

Q. Did he ever talk with you at all about the business of the company?

A. Never did mention it.

Mr. Laney: You may take the witness.

Testimony of Harry Purdy.)

Cross-Examination

by Mr. Trask:

Q. Mr. Purdy, did you while Held was there furnish those employment efficiency sheets or time sheets, whatever it was Mr. Laney was talking you about? Did you furnish those to Mr. Huber?

A. Mr. Huber? [254]

Q. Yes. Would he come in at times and get them?

A. It has been the practice down there—Mr. Huber as general manager would review our employment records and then take it up with the general management to decide what is to be done. Mr. Huber was—never to my knowledge had the authority to take it on to himself to go ahead and transfer personnel or to give raises without being okayed by the management.

Q. And did you know as a fact that Mr. Huber during Mr. Held's time as manager down there would take those records and take them in to Mr. Held? Do you know that he did that?

A. That I don't know.

Q. You don't know? He could have and you wouldn't know about it, is that correct?

A. Yes, either way, I wouldn't know.

Q. As a matter of fact, who was in charge of our department at the time Mr. Held was there?

A. Mr. Leonard, Jim Leonard.

Q. And you would see Mr. Held in there talking to Mr. Leonard from time to time, would you?

(Testimony of Harry Purdy.)

A. I saw Mr. Held in the office and talked to his secretary a few times, but to my knowledge if he talked to Mr. Leonard it was in his office, I didn't see him around the department. [255]

Q. But you don't say that he didn't talk to the head of your department, Mr. Leonard, from time to time, do you?

A. No, I couldn't say because I don't know.

Q. Mr. Leonard would be the logical one to take up problems concerning your department with, he was the head of it, wouldn't he be the logical one Mr. Held would discuss these matters with?

A. He discusses the matters, but generally Mr. Leonard would pass any analysis on to me to be worked up and I didn't work any up.

Q. You don't know whether Mr. Leonard worked any analysis up for Mr. Held?

A. Well, he could have. That I couldn't say.

Q. At that time you were not the head of the department? You didn't sit in on the staff meetings as such, did you? A. No, I didn't.

Q. You knew as a fact he held staff meetings from time to time, did you not?

A. I know he held one because Mr. Leonard told me that he would be in the office and for me to take over if anything come up.

Q. Did you have any particular problems to take up with Mr. Held that you did take up with [256] him?

A. No, this department runs pretty well on its

Testimony of Harry Purdy.)

own unless someone wants an analysis of any department or profits.

Q. Mr. Held didn't come in and make any dramatic or drastic changes in the manner in which you had been operating through the past years, did he?

A. No, everything went on the same.

Mr. Trask: That is all.

Redirect Examination

by Mr. Laney:

Q. I will ask you in the usual run of the business there who it was that the manager came to to get these analyses about employees?

A. Well, generally he would go to the office manager, which was Mr. Leonard.

Q. Who was it who worked them up?

A. In most cases—sometimes he would, most cases I would because I had the time available.

Q. And what was the custom as to where the manager would come to get these analyses?

A. Well, sometimes he would call the office manager into his office or sometimes he would come out here in the main office.

Q. Did Mr. Held ever come out there to get any of those analyses to the main office? [257]

A. Not that I know of.

Mr. Laney: That is all.

(Testimony of Harry Purdy.)

Recross-Examination

By Mr. Trask:

Q. You are still employed down there—still working? A. Yes.

Q. Mrs. McInerney called you about coming up here?

A. She called this afternoon and told me to come up.

Mr. Laney: May I ask this—this man who was head of the department, is he there now any more?

The Witness: Mr. Leonard? No, he left two months ago.

Mr. Laney: And you are head of the department?

The Witness: I am head of the department now.

WANDA SCHOEN

called as a witness by and on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney: [258]

Q. What is your name, please?

A. Wanda Schoen.

Q. Is it Miss or Mrs.? A. Mrs.

Q. Mrs. Schoen, what is your employment now?

A. I am on the switchboard, PBX telephone.

Q. That is the switchboard there at the office of these two companies that are involved in this litigation? A. Yes, sir.

Testimony of Wanda Schoen.)

Q. I will ask you whether you were switchboard operator there during the time when Mr. Held was there from April 1, 1952, until about the 20th of June of 1952?

A. Well, I wasn't there right from April 1. I started my employment there April 28.

Q. You started there April 28. Who was the switchboard operator before you?

A. Well, I believe her name was Betty Cannon.

Q. Do you know where she is?

A. No, I don't right now.

Q. From April 28 then on during the time that Mr. Held was there until June 20, what did [259] you observe as to whether Mr. Held remained there at the job or not?

A. Well, I observed that I didn't ever get to meet him and I had a call or two for him and would ring in his office and if he wasn't there, which was quite a few times I didn't know what to do with the call, how to handle it.

Q. What did you observe as to whether he was there most of the time or gone most of the time?

A. Well, he was definitely gone most of the time.

Q. Did he leave any word with you as to where to find him or where he was when he was gone?

A. No, because I used to have to ask Mrs. McInerney there if she knew.

Q. Would she know where he was?

A. No.

Mr. Laney: Take the witness.

(Testimony of Wanda Schoen.)

Cross-Examination

By Mr. Trask:

Q. You say you began work there April 28?

A. Yes, sir.

Q. How many girls are on the switchboards down there?

A. Well, I am the full-time girl and then [260] there are one or two relief girls.

Q. During a period of a day how many different girls are on the switchboard?

A. Just two, myself and the relief girl, and the relief girl just relieves at lunch and maybe 10 or 15 minutes other than that.

Q. Intervals during the day? A. Yes.

Q. Is there just one girl that has been on as relief girl since you have been there April 28?

A. Well, there was only one from April 28 until sometime last summer.

Q. You say Mr. Held never on any occasion while you were there you don't recall any occasion of his having left word with you where he was when he left? A. No, sir, I don't.

Q. You never recall any occasion of that?

A. No.

Q. You testified in answer to Mr. Laney's question that he wasn't there hardly at all. Where is your office with relation to his?

A. Well, my switchboard is right out in the store. It is in the rear of the store and Mr. Held's

(Testimony of Wanda Schoen.)

office was right in back of me, so that he would come right by on his way out. That was about [261] the only time I ever saw him was on his way out.

Q. You don't know what he was doing or whether he was on company business or what he was doing at the times he was out, do you, Mrs. Schoen? A. No, I don't.

Mr. Trask: That is all.

Mr. Laney: That is all.

LEWIS G. WAHMSLEY

called for cross-examination by the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Redirect Examination

(Continued)

By Mr. Laney:

Q. Mr. Wahmsley, counsel has brought out from you something about margins in some of the years. Have you the data so that you could give the margins in the Southwest—produced by the Southwest Co-Operative Wholesale or shown by their records from the year 1948 through the year 1952 just to compare it? Do you have those data?

A. Yes, I do. Revolving fund certificates to Southwest Co-Operative Wholesale for the fiscal year ending February 28, 1948, \$193,447.01.

Q. Now you say that was what?

A. That is revolving fund certificates [262] issued for margin for the year—

(Testimony of Lewis G. Wahmsley.)

Q. That is the margin, is it?

A. That is of the Southwest, yes.

Q. Now that was for the year 1948?

A. Fiscal year ending February 28, 1948.

Q. It was really mostly the year 1947?

A. Yes.

Q. Then for the fiscal year ending February 1, 1949, what was it?

A. Well, it is February 28, 1949, would be \$143,569.30.

Q. That ending February 28, the year ending February 20, 1950, what was the margin?

A. \$121,555.11.

Q. And then for the year ending February 28, 1951? A. \$249,204.02.

Q. Then the margin for the year ending February 28, 1952? A. \$406,102.79.

Q. Then for the year ending February 28, 1953?

A. \$194,975.68.

Q. As to the period then from February 28, 1953, onward now, what have you to say as to the condition [263] of the company with regard to what margins it may produce, good or bad or what?

Mr. Trask: Object, if the Court please. That would be speculative.

The Court: I think so.

Q. Well, what is the condition of the company now that has any bearing on its margin?

Mr. Trask: Same objection. I don't understand counsel's question.

The Court: I don't, either.

Testimony of Lewis G. Wahmsley.)

Q. Is the company functioning full tilt now?

A. No, it is not.

Q. What is wrong with it?

A. Well, in September, 1952, why the feed mill which is approximately 25 to 30 per cent of the gross volume burned down.

Q. And is it in operation yet?

A. It is not in operation full 100%. It is partially operating now, but there probably will be another 30 to 45 days before it gets in complete production.

Q. Does this co-operative have anything to do with cotton products?

A. Nothing other than furnishing the farmers who [264] are growing cotton.

Q. I will ask you whether there is any connection between the bolt of cotton that will be allowed and the income of this company?

Mr. Trask: Objection. If the Court please, going into matters that are speculative and have no bearing.

The Court: This man is qualified as an accountant, not an economist. He may be qualified as one, but you haven't qualified him.

Q. Then I will ask you from your analysis of these—well now what about the margin of the other company, of the Southwest Co-Operative Wholesale?

A. The other company is United Producers and Consumers.

(Testimony of Lewis G. Wahmsley.)

Q. I mean the other company, the United Producers.

A. Well, the United Producers and Consumers margin stays pretty close to the Southwest as the major portion of their income is derived from the revolving fund from the Southwest Co-Operative Wholesale. At the time of purchase United gets a cash discount which sometimes covers the cost of operation, sometimes it doesn't, but that cash discount is computed as closely as possible to cover the actual cost of [265] operation of the United Producers and Consumers.

Q. Well, then United went along about the proportionate same, didn't it?

A. Pretty much the same, yes.

Q. I will ask you whether you know what elements there are that go into making up or have an effect upon the making up of the amount of this margin in the future. What elements go into that?

Mr. Trask: If the Court please, I object. I think that is remote and speculative and has no bearing on this case.

Mr. Laney: We have to meet it. They are speculating about what is in the future, we just want to show the facts.

Mr. Trask: Except the difference we are basing it upon the facts of reports of actual earnings and now the question is directed to what future contingencies might occur which I think is getting too remote.

Testimony of Lewis G. Wahmsley.)

The Court: Go ahead, but I doubt that the Court will pay much attention to it.

The Court can speculate as well as the witness.

Mr. Laney: If the Court will pardon me, there is nothing speculative as to what they [266] think they will do in the future.

The Court: Well all right.

Q. What elements then do you say will have a bearing upon what the amount of margin of the companies will be for the fiscal year ending February 28, 1954, and then that fiscal year?

A. Well, the only fact that I can see that can have a bearing on it is the volume of business they do.

Q. What would that depend upon?

A. That depends upon supplies and what not required by the farmers.

Q. What would that depend upon?

Mr. Trask: I object as remote, speculation on speculation.

The Court: You may answer that if you want to.

Q. What are the elements—I just want the facts about what the prospects are.

A. Mr. Laney, that is hard for anyone to anticipate.

Q. All right, I won't press it. As to the few months in the spring, that is particularly those months of April and June, I will ask you whether they are average months or whether there is an increase in [267] activity during that time.

A. Well, that depends on the department which

(Testimony of Lewis G. Wahmsley.)

you are considering. Your farm supplies during those months are up. Your fertilizer is up but you don't have your insecticides. Your insecticides come in a period of July, August and September.

Mr. Laney: That is all.

Recross-Examination

By Mr. Trask:

Q. Mr. Wahmsley, did I note that you had reduced to writing the figures about which you have just testified? A. Yes.

Q. Would you have any objection if I took these? These are the figures that you reduced at my request, is that right? A. Yes, sir.

Mr. Laney: He wasn't testifying about those, was he?

Q. Is this the matter about which you just testified?

A. No, I was testifying on the Southwest, Mr. Trask.

Q. Oh, you didn't give us the combined [268] margin.

A. No, I just gave the Southwest. That is what he asked for.

Q. I had asked you for the combined margin.

A. Yes, and this is the combined.

Q. What you have handed me now is the combined margin? A. Yes, sir.

(Plaintiff's Exhibit 12 marked for identification.)

Testimony of Lewis G. Wahmsley.)

Q. Mr. Wahmsley, showing you Plaintiff's Exhibit 12, is this the combined margin about which you have testified, Plaintiff's 1 for identification?

A. Well this is the one, Mr. Trask, not the figures that I just testified in Mr. Laney's examination.

Q. That is right, but the figures you prepared at my request——

A. Yes, those are the ones prepared at your request for the combined net margin of the two companies for the years involved there.

Mr. Trask: Offer it in evidence.

(Plaintiff's Exhibit 12 received in evidence.)

Q. Referring to 12 in evidence, Mr. Laney has asked you about the margin figures for Southwest Co-Operative which you testified about. [269]

A. Yes.

Q. And Plaintiff's 12 in evidence contains the figures about which you have testified as to the margins of Southwest plus the margins as to the United? A. That is right.

Q. And shows a combined margin and in addition it shows the cash rebates distributed for fertilizer and insecticide for the years in question?

A. That is right.

Q. That is pursuant to your testimony this morning with respect to insecticides the margin was handled a little bit differently than with other merchandise?

A. On fertilizing and insecticide both due to the

(Testimony of Lewis G. Wahmsley.)

source of supply when it got critical you had to sell at what the competition was selling or thereabouts which was in excess of the desired margin and as a result a cash rebate was given on those items.

Q. Now, Mr. Wahmsley, I note that your figures for 1953, \$194,975.68 as the margin is of Southwest only? A. Yes.

Q. You don't have the figure of United for [270] that fiscal period?

A. It hasn't been completed, Mr. Trask.

Q. But you gave an estimate of what the margin would be as to United, did you not?

A. Yes, I did.

Q. What was that estimate? A. \$40,000.

Q. So that for 1953 the combined margin is approximately \$235,000? A. That is right.

Q. But in 1952 do I understand you to say you suffered a fire loss out there?

A. Yes, in September.

Q. That destroyed the feed mill?

A. Yes, it did.

Q. And what is the margin produced by the feed mill during ordinary fiscal periods operations?

A. Well, that is hard to determine exactly, Mr. Trask, because it is tied in with your farm service division; administrative costs are spread over the entire operation there.

Q. What did it produce during the fiscal year prior? A. It is not set out separately.

Testimony of Lewis G. Wahmsley.)

Q. Isn't it set out in your annual report [271] separately?

A. No, it is not, it is under the farm service which includes fertilizing, insecticide, feed and seed.

Q. Did you have a way of breaking that down?

A. We break the sales down.

Q. Just a minute ago you testified for Mr. Laney that that wouldn't be ready for 30 or 45 days and that represented a percentage figure that I didn't catch of your operations that you said were substantial. What was that percentage figure?

A. Between 30% and 40% of your gross sales.

Q. Then for this fiscal period of 1953 where there was a decline from \$406,000 to \$235,000, a considerable portion of that loss or decline is represented by the loss of the feed mill during that period of time, is that not correct?

A. A portion of it is, yes.

Q. Then after the end of 30 or 45 days you expect to get the feed mill back into operation and the operations will return to their normal status, is that not correct?

A. We assume they will.

Mr. Trask: That is all. [272]

(Testimony of Lewis G. Wahmsley.)

Redirect Examination

By Mr. Laney:

Q. That I may understand Plaintiff's Exhibit 12 here, where you put down cash rebates contributed, explain what that means.

A. That is what I was talking about this morning. That is an adjustment in price due to competition, Mr. Laney.

Q. Is that any part of what you call the net margin?

A. No, it is not. That is not taken into consideration. That reduces the member sales by that amount.

Q. For the benefit of the Court you might go into that and explain.

A. Well, on 16-20 fertilizer, which is 16% ammonia nitrate and 20% phosphate, there is only one source of supply, which is Mathesan Chemical. They say you will sell it at a specified price or you don't get it. That price is \$3 to \$5 a ton more than we normally get on a ton of fertilizer in the margin that we compute that for our members, but in order to get that supply we add on and sell at the regular price. Then 60 days later we refund the difference between our ordinary margin and what the margin was [273] computed on that actual sales price.

Q. So that is no part of this margin?

A. No, it is not.

Mr. Laney: That is all.

Testimony of Lewis G. Wahmsley.)

Recross-Examination

By Mr. Trask:

Q. Irrespective of how you consider this, Mr. Wahmsley, in your own accounting, and there can be a difference as proper accounting method, can there not?

A. Oh, yes, that is very true.

Q. The margin that you have computed, speaking about the ordinary margin of these operations, is a margin that is computed as between the difference between the sales price of goods sold to consumers and the cost of that goods and the expense of operation. That is margin is it not?

A. That is right.

Q. Then with respect to insecticides and fertilizer, you sell your insecticides and fertilizer at the regular established market price and what you are testifying to, as I understand it, is that with respect to certain fertilizer there is a fair-trade level below which you can't sell that merchandise and still handle it, isn't that right? [274]

A. That is right.

Q. So you do sell it at that price and then you rebate the fertilizer differential between the sales price and the cost as a cash discount instead of handling it as your other merchandise on a revolving fund discount at the end of the year, isn't that correct?

A. No.

Q. Well, you do refund it?

(Testimony of Lewis G. Wahmsley.)

A. A portion of it.

Q. What portion?

A. Well down to your ordinary margin. If you desire \$5 a ton on fertilizer and you get \$8 or \$16 or \$20, you refund \$3 a ton.

Q. How much on this cash rebate distributed is represented by that rebate that you have just spoken of and the ordinary rebate that is handled as to other merchandise? In other words you have a figure here for February 28, 1952, of cash rebates distributed, \$16,962 or \$17,000.

A. That is on insecticide.

Q. Well insecticides and fertilizer is it not?

A. Yes, but the major portion of that is [275] insecticides.

Q. Is that handled any differently?

A. No.

Q. Your combined then is a figure of approximately \$17,000?

A. That is right.

Q. Then that figure represents the difference between the sales price at which those items of merchandise are sold and the cost of the merchandise to the consumers?

A. No, it is not either. That is the difference between—well, I can tell you very frankly on the insecticide, there is \$5 a ton rebate to the member in cash.

Q. And is that \$5—are those the rebates that total approximately \$17,000?

A. There is \$3 on fertilizers and \$5 on insect-

Testimony of Lewis G. Wahmsley.)

icides included in the figures that you are talking about.

Q. Is that the total margin on those items?

A. No, it is not.

Q. Where is the rest of the margin, is that included in the ordinary margins up above in those figures? A. Yes, it is.

Q. Then the \$3 or \$5, those two items [276] that you have just mentioned as the cash rebates going up to make the cash rebates, is a part of the difference—then let's put it that way, between the sales price and the actual cost, is that not correct?

A. That is right.

Q. And the rest of it is handled in the ordinary way and appears in your annual margins?

A. That is true.

Q. So this \$17,000 odd figure is still a part of the margin between the cost and sales price, but it is handled in a different way?

A. It is a special discount.

Q. But still a margin between cost and sales price, is it not? A. That is right.

Mr. Trask: That is all.

Redirect Examination

By Mr. Laney:

Q. But the sales price is raised by this \$5 in the one instance with the understanding that that is to be rebated? A. It is most certainly.

Mr. Laney: No further questions.

HARVEY SIMS

called as a witness by and on behalf of Defendants,
being [277] first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Harvey Sims.

Q. And are you in the employ of one of the
defendants that are involved in this litigation?

A. Southwest Co-Op.

Q. In what capacity are you employed there?

A. In the mill and insecticide.

Q. State whether or not you are the supervisor.

A. I was a production manager in the mill and
a labor foreman in the insecticide.

Q. Were you employed in that capacity during
the time when Mr. Held was supposedly with the
company there from April 1, 1952, to June 20 of
that year? A. I was.

Q. About how long have you been in the employ
of these companies or one of them?

A. Since 1936.

Q. That at that time was which company?

A. C. M. Martin Wholesale.

Q. That was the predecessor of this United?

A. That is right. [278]

Q. Predecessor of the Southwest Co-Operative
Wholesale. Now did you meet Mr. Held after he
came here? A. Yes.

Q. When did you first meet him?

Testimony of Harvey Sims.)

A. Well, I saw him—he had a meeting with me and Ivan Stoltzfus one time.

Q. When was that?

A. I don't know what date it was. A couple of weeks after he came down here.

Q. And what was that meeting about?

A. He just told us that he run a business and we look at reports and if anything was wrong he would ask us about it.

Q. Did he ever give you any directions as to how to operate or any suggestion?

A. No, he didn't say anything—he didn't say anything to me.

Q. How many times all told did you see him or he see you? That is, this second occasion.

A. Well, when they was placing a man—changing him from one job to the other.

Q. That is taking a man from whom and giving him to whom?

A. Taking him off the trucks and putting [279] him out in the field as a salesman.

Q. Did he at that time in any way discuss with you or give you any discussions or directions about how to run the business?

A. We only talked about the man that time.

Q. And that was just taking an employee from your department and taking him to another department?

A. Right.

Q. Did he at any other time in any way communicate with you or inquire as to how your department was running or communicate with you as

(Testimony of Harvey Sims.)

to how to run it with any suggestions, anything of that sort?

A. No, that is the only two times. Of course I might have spoke to him a few times, but that is the only thing I can remember.

Q. Well, now at that department head meeting that some have spoken about, about the middle of May of 1952, did he ask you to that?

A. I wasn't in it.

Q. Did he ask you—invite you there?

A. No.

Mr. Laney: You may take the witness.

Cross-Examination

By Mr. Trask: [280]

Q. Mr. Sims, how long have you been in charge of the shipping dock and office or that department that you are in now?

A. Oh, I would say 6 years.

Q. In other words, as I understand it, your department is getting merchandise loaded for shipment and seeing that it is shipped to the proper person, is that right?

A. Not only that. I am production manager.

Q. Production manager of what?

A. The feed mill.

Q. And you had that job as manager about 6 years, you say? A. I would say so.

Q. Prior to that time you kind of grew up in the business down there, you knew it pretty well?

Testimony of Harvey Sims.)

A. I wouldn't say that. I know my part of it.

Q. You know your part of it pretty well. You are still an employee down there, still doing the same job? A. Yes.

Q. And during the time he was there did you have any particular fundamental or difficult problems that were different from what they had [281] been during the 6 years you have been there?

A. No, I don't know.

Q. Everything went along pretty much the same on the 2nd of April after he came as it did on the 5th of March before he came, did it not, Mr. Sims? A. Yes.

Q. He didn't come down and change your method of operation or fire your employees or do anything to interfere? A. No.

Mr. Trask: I believe that is all.

Redirect Examination

By Mr. Laney:

Q. Did he ever inquire or find out whether your department was running in a good fashion or a poor fashion? A. He didn't ask that.

Mr. Laney: That is all.

Mr. Trask: No further questions.

IVAN STOLTZFUS

called as a witness by and on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney: [282]

Q. Your name, please?

A. Ivan Stoltzfus.

Q. Mr. Stoltzfus, are you in the employ of one of these defendants that are involved in this litigation?

A. Yes, Southwest Co-Operative Wholesale.

Q. Now, what is your capacity there? What is your job?

A. I serve as manager of the sales floor and sales office in the feed and fertilizer department.

Q. That is of what?

A. Feed and fertilizer.

Q. And how about the insecticides?

A. Some insecticides too.

Q. How long have you been with this company approximately? A. 5 years.

Q. What about the sales warehouse and sales office, do you have anything to do with those?

A. Yes.

Q. In what capacity?

A. Manager of the employees.

Q. When did you first meet Mr. Held?

A. The first time I suppose was approximately 2 weeks after he came there when he met Harvey Sims and [283] he met the two of us.

Testimony of Ivan Stoltzfus.)

Q. What was the subject matter at that meeting?

A. He mentioned that he would like to operate business from reports and that he judged the progress of the business from those reports and if things didn't go well he started to ask questions.

Q. Did he ask you for any reports?

A. No, can't say that he did.

Q. Did he make any inquiries or find out as to whether you were running it well or poorly?

A. Not from me.

Q. Did you ever meet him again?

A. Yes, we held two meetings in his office, heads of the departments met in his office I think twice that I attended.

Q. Now, as to the first of those meetings about when was that?

A. Well, I don't know for certain.

Q. About how long was the meeting?

A. Probably half an hour.

Q. And did he give any advice or any suggestions or discuss with you how you were to operate your business?

A. We discussed mainly the general maintenance around the place. [284]

Q. General maintenance. Will you explain that first?

A. Well, I remember that we discussed grading of the grounds and cleaning up the place, making it look a bit more tidy.

Q. Talked about grading what grounds?

A. The grounds around the buildings.

(Testimony of Ivan Stoltzfus.)

Q. And then how long after that was the next meeting that you spoke of?

A. Probably two weeks.

Q. And that meeting then did you attend that?

A. Yes.

Q. And how long did that last?

A. About the same length of time, I would say.

Q. What was the subject matter of that meeting?

A. Well, it followed the same general lines. Mr. Held asked each of us whether we had any suggestions to make.

Q. And did you make any suggestions and did he follow it up and discuss it at all?

A. Well, there were a few suggestions made. I don't recall just what they were, but they were not [285] of importance in the operation of the business.

Q. Well, do you recall what it was he talked about?

A. I don't recall for certain except the maintenance of the grounds is all that I remember for sure.

Q. Well, now did he ever come there and familiarize himself with this work that you had charge of there, the feed and seed and insecticide and fertilizer business?

Mr. Trask: Object to the form of the question. This witness would have no knowledge of whether any person familiarized himself.

Testimony of Ivan Stoltzfus.)

Q. Did he while you were present or around here?

Mr. Trask: Same objection, it is the same question.

Q. Did he ever come there to the feed or the feed plant and make any inquiries of you about how it was run and being run?

A. No, he came there a few times, but there were no matters of importance discussed.

Q. How about the insecticide and fertilizer business? Did he make inquiries or become familiar with that?

Mr. Trask: Same objection. [286]

The Court: Same ruling.

Q. Did he make any inquiries about it?

A. Not of me.

Mr. Laney: That is all.

Cross-Examination

By Mr. Trask:

Q. You are still employed down there?

A. Yes.

Q. Mrs. McInerney asked you to come up here and testify?

A. Someone did. Mr. Sims asked me to come along, I really don't know who called.

Q. You did attend at least two staff meetings representing the department over which you spend most of your time? A. Two meetings.

Q. And those staff meetings, at those staff meet-

(Testimony of Ivan Stoltzfus.)

ings Mr. Held would go around and ask each one if they knew—if they had any suggestions or problems and invite their comments, is that correct?

A. That is right.

Q. And anybody that did have suggestions or problems, if they did would speak up and you would discuss it, is that the way you handled the meeting?

A. That is right. [287]

Q. And in addition he came down to your plant two or three times, you say? A. Two times.

Q. And you didn't keep any particular track of it as to the times he did come down or didn't?

A. No.

Q. You spoke of his comment that he was accustomed to checking the reports of the businesses of the departments and seeing how the departments were doing. Did your particular department make a report?

A. Not a written report, except, let me take exception there—except that he could familiarize himself with the sales invoices and such but there was no condensed written report.

Q. What is your particular feed and fertilizer department?

A. Yes, I am in insecticide sales, too.

Q. The reports of sales of the feed and fertilizer and seed department are all contained in broken down figures on the report of the entire operation, are they not? A. That is right.

Q. So he wouldn't have to come to you and look through the invoices to find out how much sales

(Testimony of Ivan Stoltzfus.)

our [288] department was doing, would he? He could check those, couldn't he, from the monthly invoices, monthly reports of the business, could he not? A. I would say so.

Mr. Trask: That is all.

Mr. Laney: That is all.

PAULINE McINERNEY

Called as a witness by and on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination

by Mr. Laney:

Q. What is your name, please?

A. Pauline McInerney.

Q. Are you in the employ of these two companies that are defendants here?

A. Yes, sir, both of them.

Q. And how long have you been in the employ of these two companies that are defendants here? A. Since January, 1939.

Q. How long have you been in the employ of the Southwest Co-Operative Wholesale?

A. Since its organization March 1, 1944, and prior to that time in the employ of the Martin Wholesale, its predecessor.

Q. I believe it came out in the evidence [289] that you are the assistant secretary of both of these companies, is that correct?

A. That is correct.

Q. I will ask you whether you were the one who

(Testimony of Pauline McInerney.)

is accustomed to actually keep the minutes of the meetings of both companies.

A. That is correct.

Q. I will ask you whether you have produced the minutes books of both companies here.

A. Yes, sir.

Q. Which one of these is—well say the United Producers? A. The top one.

Q. We will come first please to the matter of this. Are you familiar with when Mr. Held was first communicated with? A. Yes, sir.

Q. That was by whom?

A. Mr. C. M. Martin.

Q. Have you the carbon copy of that letter to him? A. Yes, sir.

Q. I will call your attention to Defendant's Exhibit A and I will ask you to look that over and see if you recognize that as the letter you just spoke [290] of that Mr. Martin sent in the first communication. A. That is correct.

Q. When was it that you first saw Mr. Held as near as you can fix it?

A. The latter part of January.

Q. Of 1952? A. Yes.

Q. And then was he in any way employed during that time? A. He was not.

Q. And how long did he remain? Where did you see him?

A. I saw him about the office of the company at 1821 East Jackson and I saw him again at the

Testimony of Pauline McInerney.)

Saddle & Sirloin Club at a dinner which Mr. Smith gave for Mr. Held.

Q. That was in January?

A. That is right.

Q. And then when did you next see him?

A. I next saw him on March 6, 1952.

Q. Now, on March 6, 1952, state whether or not there was a board meeting of both of the companies.

A. There was a board meeting called for both the Southwest Co-Operative Wholesale and United Producers on March 6. [291]

Q. And were you present at some part of that meeting?

A. I was present at the beginning of the meeting, yes, sir.

Q. Was there to be some discussion about proposed employment of Mr. Held?

A. Yes, sir. At the time they started discussion on the proposed appointment of a manager, all people except the Board were excused.

Q. And was Mr. Wahmsley there?

A. Yes, sir, and he was likewise excluded.

Q. And you were excluded? A. Yes, sir.

Q. When the meeting was over did you see Mr. Held after it was over?

A. Yes, sir, Mr. Smith and Mr. Held came to my office after the meeting was over and Mr. Smith handed me a copy of the resolution which he stated had passed—had been passed at the meeting and on glancing at that I told Mr. Held that we were very

(Testimony of Pauline McInerney.)

happy that he was going to be with us and both he and Mr. Smith said it had not been settled, that he had this prior commital in the east, that he had to be released from it, and he would let us know by March 15 whether he would accept it or not. [292]

Q. About the 15th? A. Yes.

Q. And then I will ask you whether that minute or that resolution that you saw was copied verbatim in the minutes of this meeting of March 6, 1952.

A. An exact copy was entered into the minutes.

Q. Was it in the minutes of each company?

A. Yes, sir.

Q. Calling your attention to the minutes in this book, you say?

A. That is United Producers and Consumers.

Q. Will you find the minutes of that meeting please. Now, as to the portion of the minutes that has anything to do with Mr. Held will you read that?

A. Motion was made by Klick, seconded by Mr. Collier and passed unanimously that Mr. Smith and Mr. Wahmsley be authorized to employ Mr. Held as general manager and work out terms of employment.

Q. That is the resolution that was handed to you by Mr. Smith in the presence of Mr. Held?

A. That is right.

Q. As to the minutes of that same date, in the other company—this is which company? [293]

A. Southwest.

(Testimony of Pauline McInerney.)

Q. Will you look up the minutes of that and then as to the minutes of the meeting of March 6, 1952, of the Southwest Co-Operative Wholesale, I will ask you to read all portions of it that have anything to do with Mr. Held.

A. Motion was made by Mr. Collier, seconded by Ralph Ashby and passed unanimously that Mr. Smith and Mr. Wahmsley be authorized to employ Mr. Held as general manager and work out the terms of employment.

Q. That was on the evening I believe you said of the 6th that this happened? A. Yes, sir.

Q. Now, I will ask you whether you saw Mr. Held and Mr. Smith at any time the next day?

A. I saw Mr. Smith in the afternoon about 2:00 o'clock and he asked me if Mr. Held had called. He said that Mr. Held was going to meet with Mr. Martin at the Adams Hotel that day and going to call him and let him know when he would like to be picked up and come out to the company and Mr. Held called approximately I would say 2:30 or 3:00 and Mr. Smith did pick him up and bring him to the offices of the company; at the time they discussed among them, just the two of them, their [294] own business. I do not know about that.

Q. Did you see them along about 5:30 of that afternoon of the 7th? A. They came in.

Q. Just yes or no, whether you did.

A. Yes.

Q. Had you seen what they were doing meanwhile? A. No, sir.

(Testimony of Pauline McInerney.)

Q. Go ahead and tell what happened then along about 5:30.

A. They came in about 10 minutes of 5:00, some-think like that.

Q. You say they?

A. Mr. Held and Mr. Smith and stated they were going to go to the hotel to pick up a copy of the contract which Mr. Held stated his lawyer in Des Moines had drawn up and that they would be back and would like me to remain in order to work with them on this contract and they returned about 5:15.

Q. And then what happened?

A. They had this contract form which, as I say, Mr. Held stated his lawyer in Des Moines had drawn up. Mr. Held dictated two changes in the contract and I typed the contract from the [295] contract which he presented, adding the note which he had dictated.

Q. I will show you Defendant's Exhibit D in evidence. Did you hear the testimony of Mr. Held to the effect that that was the copy of the contract that he had at that time? Did you hear his testimony about that?

A. Yes, sir.

Q. Is he correct in that?

A. That is not true. I had never seen that contract until yesterday.

Q. What was the size of the contract that he had that he said his lawyer had drawn up?

A. It was a one-page document which was type-written and not printed.

(Testimony of Pauline McInerney.)

Q. I will ask you whether you have your stenographic notes showing what they dictated and what you wrote and what you copied from that?

A. Yes, I have.

Q. When that was drawn up then I will ask you if that—if what you drew up was this form of contract, one copy of which was introduced in evidence as Plaintiff's Exhibit 1. That is the contract involved in this litigation? A. Yes, sir. [296]

Q. Then when that was drawn up go ahead and state what further was said and done.

A. The contract was typed from the copy which was brought with the additions which had been dictated. Mr. Smith signed two copies, it was typed in triplicate, he signed two copies and it was the understanding between Mr. Smith and Mr. Held—

Mr. Trask: Objection. Let's just get what was said.

Q. What did they say?

A. It was stated that Mr. Held would take two copies of the contract with him which had been signed by Mr. Smith and that he be released from his commitment in the east, that he would let Mr. Smith know by the 15th whether or not he would accept the employment and would at that time sign the contract.

Q. By the 15th of what month?

A. March, 1952.

Q. And then what was your accustomed quitting time at that time? A. 5:30.

Q. This was made from 5:15 on, was it?

(Testimony of Pauline McInerney.)

A. Yes, sir.

Q. And was Mr. Wahmsley there at all? [297]

A. Mr. Wahmsley was not there.

Q. I will ask you to state if you know, whether he was available at his office, or do you know?

A. I assume that he was. We can usually reach him when we need him.

Q. Did Mr. Held mail that contract back by the 15th of the month? A. No, sir, he did not.

Q. Did you later see the contract?

A. Yes, sir.

Q. And where was it sent to?

A. It was sent to Mr. Smith's residence in Glendale, Arizona.

Q. If you know, state whether it arrived there before or after his death.

Mr. Trask: Object. No possibility of the witness knowing unless she was present.

Q. If you know.

A. It arrived after his death.

Q. Now, I will ask you to state whether you were at his house on the day of his death.

A. I was at his residence twice on the day of his death.

Q. When were you first there? [298]

A. I was there approximately 10:30 or 11:00 in the morning.

Q. Was this contract or any letter containing it there at that time? A. It was not.

Q. And then did you come back later?

Testimony of Pauline McInerney.)

A. I returned to his residence that evening approximately 7:00 o'clock.

Q. Did you have information that this contract was supposedly signed and in the mail?

A. Yes, sir, Mr. Smith had told me that it was.

Q. And then when you came back later was the contract there?

A. Yes, sir, it was there at 7:00 in the evening.

Q. Had it come through the mail?

A. Yes, sir.

Q. Had the envelope containing it been opened?

A. No, sir.

Q. And then what was done with the contract?

A. The contract was filed at the office.

Q. Did you bring it back to the office?

A. Yes, sir. [299]

Q. Did you at that time have any knowledge of whether or not Mr. Wahmsley had helped to work out the terms of this contract?

A. No, I did not. I knew that he was not there at the time that it was prepared and written.

Q. And then did you have some communication with Mr. Held after Mr. Smith's death?

A. Yes, sir, I sent him a telegram the afternoon of Mr. Smith's death stating that he had died and the funeral would be held on a certain day.

Q. Did he communicate with you?

A. Yes, he called on the telephone the following day, said that he would not be able to be here because he was planning to leave Des Moines the day

(Testimony of Pauline McInerney.)

of the funeral and that he would be here to start work on the first day of April.

Q. Then did he come out?

A. Yes, sir, he arrived the day before, the first day of April, I guess the 31st.

Q. Did you see him on the first day of April?

A. Yes.

Q. I will ask you whether you were there at the office of these companies during the entire period [300] from April 1, 1952, until June 20 of 1952?

A. Yes, sir, I was there every day from 8:00 in the morning until almost 6:00 at night with the exception of Saturdays and Sundays.

Q. Now, as to the first week after he came there what did Mr. Held do and say?

A. The first week he was there—the 1st was on Tuesday, I believe, and Mr. Held was in the office most of that week. However, he was in his office with the door closed, he did not take any active part in the business except the board meeting he attended on the 3rd day of April.

Q. On the 3rd day of April he did attend the board meeting?

A. Yes.

Q. And I will ask you to state whether at that board meeting of April 3 the minutes of the meeting showing about his proposed employment were read and approved?

A. Yes, sir, the minutes were read and approved.

Q. Then what next did he do? Go ahead and tell what he did and where he was, if you know.

(Testimony of Pauline McInerney.)

A. He stated on Thursday or Friday of that first week that he had planned on going to the [301] coast the following week and would be gone all week, that he was going to call on various members of the Southwest Co-Operative Wholesale and attempt to build up the sales volume of those companies with the Southwest on equal volume with the United if it could be done.

Q. And what did you tell him about that?

A. I told him the type of business that each of those members operated, that two of them were primarily market organizations for the purpose of marketing seed and hay and that the principle supplies that they handled were fertilizer and insecticide, that the member that was located in San Diego operated a feed mill only, that that mill was far larger than ours and that they had never bought any from us with the exception of a few cars of barley during harvest time.

Q. And did he go on this trip then?

A. Yes, he did and was gone the entire following week.

Q. Now, after he returned I will ask you whether you had any talk with him about whether or not you were correct in telling him about it.

A. Yes, sir, he said that from his observations of the company that there was not a great deal of business that we could do with them. [302]

Q. Now, did you ever have any talk with him about Yuma or did he make any remarks to you or not?

(Testimony of Pauline McInerney.)

A. No, sir, we discussed the fact of the farming development in the Yuma Mohawk area and briefly—and he merely stated that he was interested in locating a farm here and wondered what locality would be the best to locate in. That was the only conversation we ever had except after he came back he did say that he had stopped in Yuma and visited this Yuma marketing co-operative which was located there. However, they have no connection with either of our companies.

Q. Then what did he do the next week?

A. The following two weeks he was out of the office the major portion of the day except perhaps an hour during the day and he told us that he was calling on the Board of Directors.

Q. Told you he was calling on the Board of Directors for a couple of week? A. Yes.

Q. After that what did he do?

A. I have no accurate knowledge of what he did. I don't know what it was except that he was in the office very little of the time, between 30 minutes and an hour each day. [303]

Q. You have brought it up to about what time now? From then, we will say, up until he went east. That I believe was about May 25, was it?

A. Yes, it was his practice during all of that time to visit the office perhaps half an hour to an hour a day, usually in the morning he would be there around 8:00. Once in a while he would come in in the evening once in a while.

Testimony of Pauline McInerney.)

Q. Would he leave word with the switchboard girl?

A. He did not and I made inquiry of his secretary and she did not know either.

Q. Can you give us some idea how frequently that would occur that you didn't know where he was when he was gone?

A. That would occur several times each day.

Q. That is, that they would make inquiries?

A. Yes.

Q. Then was there a board meeting held sometime the latter part of May? That is May 23 or 25 or someplace along there?

A. It was the latter part of May. I know that it was the last Friday. The exact date I don't remember. [304]

Q. Could you refresh your memory and tell us the exact date when that board meeting was? And I am referring to a board meeting just before he left for the east.

A. I don't believe this was inserted. I have it in my other file there—May 23.

Q. May 23. Now, then do you know of your own knowledge or not where he went then or did he tell you anything about where he was going?

Mr. Trask: At what time?

Q. At any time after this. Did he attend this board meeting of May 23? A. Yes, sir.

Q. And then did he state to you at any time after that where he was going or not?

(Testimony of Pauline McInerney.)

A. Yes, sir, about 5:00 he said that he was going back to Des Moines.

Q. And that was for what purpose?

A. Bring his family to Phoenix.

Q. And then were you present at this meeting that has been spoken of as an informal meeting of May 27? Were you present at that?

A. Yes, sir.

Q. Did you keep minutes of that or not?

A. No, sir, it was not an official meeting of [305] the Board of Directors.

Q. Who were present at it, if you remember?

A. Mr. Essley, Mr. Holly Smith, Mr. Emil Rovey, Mr. Ralph Ashby, Mr. Jack Click, Mr. I. F. Collier, Mr. John Biggs, Louis Wahmsley and myself.

Q. Now, I will ask you whether or not at any time previously to that, you did endeavor to contact Mr. Click?

A. Mr. Click was at the meeting.

Q. At the meeting of the 27th. I was mistaken. I was thinking of some other meeting. Is that the meeting as a result of which there was some telegram sent? A. Yes.

Q. Calling your attention then to the telegram which is in evidence as Plaintiff's Exhibit 2 stating "Question is raised as to legality of your contract of employment, therefore I suggest that you defer moving your family until you hear further from Board of Directors" and signed D. O. Essley. Did you type that telegram or not?

Testimony of Pauline McInerney.)

A. No, I believe this is a draft that you had drawn up and I did telephone it to the telegraph office.

Q. You telephoned it to the telegraph company. That [306] was the one he got, I see. Calling your attention to Plaintiff's Exhibit 3 in evidence, his reply to that in which he said "You are advised that my contract entirely legal and I am continuing my employment in accordance with its terms." Signed Ralph W. Held. Was that received at the office in due course? A. Yes, it was.

Mr. Laney: May it please the Court, I want to go on to another subject. Would your Honor want to adjourn at this time?

(The regular evening recess was taken.) [307]

Mr. Laney: I ask to withdraw this witness for a moment for a brief other line.

The Court: All right.

HERBERT F. HOLMES

Called as a witness by and on behalf of Defendants,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Herbert F. Holmes.

Q. And what is your business?

A. Field supervisor for the Southwest Co-Operative Wholesale.

(Testimony of Herbert F. Holmes.)

Q. How many men or sub-supervisors do you have under you? A. Three.

Q. What title do you give them?

A. They are called area managers.

Q. What area do you serve in your capacity as head field man?

A. Wherever the Co-Op operates throughout the state.

Q. And were you employed in that capacity April 1, 1952, through June 20 of that year—that is [308] the time when Mr. Held was manager of the company? A. I was.

Q. About how long have you been employed by the company? A. A little over three years.

Q. Now, about when was it that you first met Mr. Held?

A. About 2 or 3 or 4 days after he took over active management.

Q. How much time did he spend on the field?

Mr. Trask: The witness can know how much time he spent with him, but not in the field.

The Court: He couldn't answer that.

Q. Did he spend some time in the field within your knowledge? A. Oh, yes.

Q. Will you relate what that time he spent in the field was, naming the first and going on?

A. Well, as I recollect one of the first things was a tour through the Glendale-Litchfield area where we visited three different Board of Directors of the organization.

Q. What was done at that trip?

Testimony of Herbert F. Holmes.)

A. I wasn't present at all. That is, Mr. Held was talking to one of them. Sometimes I was [309] present, sometimes I wasn't. I would wander away maybe and inspect the field, but as I remember the conversations it was with regard to the plans of the organization.

Q. That took how long out of his office? Was it one day or two days or more?

A. That was one day in that area.

Q. And then what was the next trip, if any?

Mr. Trask: May we have the time established, Mr. Laney. I didn't get the time on that trip.

Q. Can you fix the date?

A. I can't recall the date, no.

Q. Were there any cotton chopper demonstrations?

A. Yes, there was a cotton-chopper demonstration scheduled, one day we were in Chandler in the morning and Buckeye in the afternoon and Mr. Held was present for those.

Q. That was one day, was it?

A. That was on the same day, yes.

Q. Then was there any other cotton-chopper demonstration?

A. There were other cotton-chopper demonstrations, but I don't recall that both of us were present. [310] I wasn't present at the one at Glenlale, I know.

Q. That was another day. Then did you ever make a trip to Casa Grande with Mr. Held?

A. Yes, we took a trip to Casa Grande and

(Testimony of Herbert F. Holmes.)

visited with the area supervisor in Pinal County and returned through the area from Casa Grande, Coolidge and through the Queen Creek area back here and stopped and talked with at least one farmer that I know of.

Q. That was who?

A. That was Mr. Hanna—at least one.

Q. And did that take one day or more?

A. That was on one day, the biggest part of one day.

Q. And then was there any trip to Safford?

A. Yes, we left Prior early one morning and spent the entire day in Safford. Now, I believe that there were two.

Q. You think there were two days in Safford?

A. Yes, the reason for that is I go down there frequently in the summer and I don't exactly recall, but I definitely recall coming into Phoenix from two different directions.

Q. And then was there some trip out to inspect some barley field?

A. Yes, we were out together to inspect a [311] barley field several miles west of Phoenix.

Q. And now, were there any other trips that Mr. Held made out of the office with you as head of the field man—supervisor—other than those that you have mentioned?

A. We were in the field, remember one day at the conclusion of a Saturday insect school—that was on one day and he attended most of those of which I believe there were four.

(Testimony of Herbert F. Holmes.)

Q. Those were on Saturdays. Well was the office closed or open on Saturdays?

A. This particular school was held not in the office.

Q. I know, but if you know state whether or not the offices of the company were closed on Saturdays.

A. The offices of the company, the way you put it, yes. We didn't normally work. That is our force didn't normally work on Saturday.

Q. Then were there any other times that he was on field trips with you as head?

A. I don't recall any other times. I do recall another time. We did visit, go down and visit the county agent.

Q. Where was that? [312]

A. At 1201 West Madison.

Q. Here in Phoenix? A. Yes.

Q. What did you do there?

A. Discussed the general agricultural picture with the county agent.

Q. How much time did you spend out of the office on that trip?

A. Probably 2 or 3 hours, as I remember. As I recall right now, that is the extent of being out in the field.

Mr. Laney: That is all.

(Testimony of Herbert F. Holmes.)

Cross-Examination

By Mr. Trask:

Q. You say that he worked on Saturdays attending field demonstrations with field men?

A. Yes, we operated an insecticide school for a great number of summer men which we held on Saturdays and he attended.

Q. He attended those meetings?

A. Yes, sir.

Q. Was that on one Saturday or several?

A. I believe it was a total of four Saturdays.

Q. Do you recall then—as a matter of fact you didn't keep any pencil and note book time sheet of the times that you were out with Mr. Held or out on these other trips, did you? [313]

A. Not as such, but I kept a diary which went up in the fire.

Q. You are just testifying here from memory, though, the best you can? A. That is right.

Q. Do you recall attending a cotton meeting with Mr. Held at the Westward Hotel one day?

A. Oh, yes, definitely.

Q. That was another day actually from morning until most of the afternoon, was it not?

A. Yes.

Q. That was on company business, was it not? Do you remember going to Dr. Roney's office with him to discuss insecticides and insects with respect to cotton?

(Testimony of Herbert F. Holmes.)

A. Yes, I attended two, I believe it was a two-day session that Dr. Roney held. That was separate. Also at this visit where I mentioned we went to the county agent's office I think we included Dr. Roney in that.

Q. In that one too in addition to the insecticide school—in all of these trips that you have mentioned, they were on company business and company affairs, were they not, Mr. Holmes?

A. Yes.

Q. All of them Mr. Held took an interest [314] in the business at hand and the company affairs at that time? A. Yes, sir.

Q. Seemed to know and understand the nature of the problem and what was involved generally?

A. Well, you say generally, yes—technically he was interested in our agriculture.

Q. With respect to some phases of the cotton he wasn't familiar with it, having been raised on an Iowa farm, as someone would have been who had been raised in Arizona, was he?

A. That is right.

Q. He was interested in learning and worked with you in these affairs with you, did he not?

A. Absolutely.

Q. Going down the list of these various trips, times, the day you went through the Glendale-Litchfield area and met the Board of Directors, do you recall the time of the month that was?

A. I cannot recall.

Q. How about the cotton-chopper demonstration

(Testimony of Herbert F. Holmes.)

in Chandler and Buckeye? Do you remember the dates and times of those?

A. No, I can't. Not from memory, I can't.

Q. You mentioned that there were other [315] demonstrations held and that you didn't attend the demonstrations, is that correct?

A. That is right.

Q. You don't know then whether or not Mr. Held might have attended the others in your absence? A. I don't know, no, sir.

Q. You can't fix the date of those other demonstrations either. A. No.

Q. Those cotton-chopper demonstrations were for the purpose of demonstrating to the farmers a piece of equipment that the co-op was interested in selling, is that right? A. That is right.

Q. The trip to Casa Grande that you said took a whole day, where you talked to Hanna and others, do you recall the date of that, approximately what month?

A. That was—that would be late April or May, late April or early May.

Q. The trips to Safford, you say there were at least two of those?

A. I believe there were two, yes.

Q. Those of course took all day. Those were on company business? [316] A. Absolutely.

Q. The trips to inspect the barley field, those were on company business? A. That is right.

Q. As a matter of fact everything you testified about was on company business, was it not?

(Testimony of Herbert F. Holmes.)

A. Exactly.

Q. Do you remember the four Saturdays working on field demonstrations? Do you remember whether those were in April or May or about when they were?

A. Yes, those would have been in May. There may have been one the last Saturday in April.

Mr. Trask: I believe that is all.

Redirect Examination

By Mr. Laney:

Q. Counsel referred to those as field demonstrations. What were they?

A. It was insecticide school, part of which was held in various conference rooms and then moved out into the field, not on every occasion.

Q. They were held in conference rooms where?

A. Generally we selected a private dining room so that we could start in the morning and have our meal and uninterruptedly go on with our [317] school.

Q. Who was conducting that school?

A. I was.

Q. That was on Saturdays? A. Yes.

Q. Counsel asked you if there were other demonstrations. I believe you stated the one at Glendale you were not present at?

A. No, there were a total of four demonstrations.

Q. There were?

A. On three different days of which I attended

(Testimony of Herbert F. Holmes.)

three demonstrations. I did not attend the Glendale demonstration.

Q. Those were demonstrations of the cotton-chopper? A. Cotton-chopper.

Recross-Examination

By Mr. Trask:

Q. Do you remember some meetings at the Phoenix Union High School attended by you and Mr. Held among others?

A. Yes, when you ask me if we met Dr. Roney that was the statement I meant that there were two days that he attended those all-day sessions.

Q. At Phoenix Union High School? [318]

A. Phoenix Technical School.

Q. Those were with reference to company business? A. Yes.

Q. It concerned entomology and the control of insects and cotton fields and what type of insecticides would best control and the insecticides that your company sold, is that right?

A. That is right.

Mr. Trask: That is all.

Mr. Laney: That is all.

LEHI B. PALMER

called as a witness by and on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Lancy:

Q. What is your name, please?

A. Lehi B. Palmer.

Q. What is your occupation or position?

A. Area supervisor or area manager, whichever title they want to call it.

Q. For which company?

A. United Producers and Southwest.

Q. I will ask you whether you were employed in that capacity from April 1 to June 20, of [319] 1952?

A. Yes, sir.

Q. And what area did you serve?

A. Call it the east side, the south side. That is east of Phoenix.

Q. You heard the testimony of Mr. Holmes I suppose, did you?

A. Yes.

Q. Now as to the cotton chopper demonstrations that he spoke about, did you attend some of those?

A. Yes, sir.

Q. Which?

A. I attended the one at West Chandler and I recall another one we had on the east side of Chandler. In fact it was the very first one that was held. It was actually before the cotton was even up. We used some blank rows in which to check and test.

Q. Were those held on the same day?

(Testimony of Lehi B. Palmer.)

A. No, that was a separate one entirely.

Q. What about the one at Buckeye?

A. I did not go.

Q. Was there any other time that you saw Mr. Held on any field trip?

A. At the same meetings and field demonstrations that Mr. Holmes mentioned. [320]

Q. Just those?

A. I did see him the one time when he was returning from someplace, where I don't know, but I did see him the one time while I was checking cotton fields.

Q. Was that on the day of any of these demonstrations you told about? A. No, sir.

Q. Your job was what?

A. Well, in the summertime we had several men working under us and we supervise those men during the balance of the year. Of course, we are calling on farmers and selling our products, whatever it may be.

Q. That was in the sale of what products?

A. Of everything that the company has to sell.

Q. What are the products?

A. Feeds, livestock, insecticides, lumber, furniture.

Q. Did it sell the products that were handled in the lumber yard or hardware department or any of those other departments? That was the other company, was it?

A. You are referring to what I would sell?

Q. Yes. [321]

Testimony of Lehi B. Palmer.)

A. Yes, we would sell everything that was down here that anyone would ask for.

Q. Well did you spend any time at the hardware store or the lumber mill or the other departments there, the retail stores?

A. During what time?

Q. During the time we are talking about?

A. Only to come in occasionally to pick up merchandise or to get reports.

Q. Other than those Mr. Holmes has mentioned and you have mentioned, were there any other occasions you saw Mr. Held on any field trips?

A. Not away from the office, no, that I can recall at the time.

Mr. Laney: That is all.

Cross-Examination

By Mr. Trask:

Q. Mr. Palmer, then on most of the occasions that Mr. Holmes testified about you, or some of those, you were present too, is that correct?

A. Yes.

Q. And some of them you were not present?

A. That is right.

Q. And some of these cotton chopping demonstrations you testified about when Mr. Held was present Mr. [322] Holmes was not present, is that right?

A. At the one, yes.

Q. At least one. Do you recall an occasion when you and Mr. Held examined a cotton field south of Mesa one night about 7:00?

(Testimony of Lehi B. Palmer.)

A. That was the time I was referring to a while ago when I stated that I met him one time out in a cotton field.

Q. Coming home from Mesa?

A. Yes, I had—I was inspecting the field and he was coming home from somewhere.

Q. At least he met you there and went over the field with you at 7:00 in the evening? A. Yes.

Q. You were there on company business?

A. Yes.

Q. He was there on company business to learn from you and to investigate, check for the company, was he not?

A. We discussed the problems of course that I have in the field.

Q. At that time? A. Yes, sir.

Q. During all of these occasions that you worked with him he seemed interested in the company [323] business, did he not? A. Yes, sir.

Q. Trying to learn and find out and acquaint himself with company affairs and the problems of this area? A. Yes.

Q. Do you recall Mr. Held attending an entomology school for two or three days in April or May at Phoenix Technical School? A. Yes.

Q. Do you recall attending several meetings of the field men in the upstairs office of the field mill down at the plant where you had some problems with lumpy insecticides or lumpy fertilizer trying to work out that problem?

A. We definitely did, yes.

Testimony of Lehi B. Palmer.)

Q. And Mr. Held was there at that time?

A. He was, yes.

Q. Worked with you and Mr. Holmes and the rest of them on that problem? A. Yes.

Q. That was an important problem of the company at that time? A. Very definitely.

Q. He helped work out a contract with the [324] held men in the manner in which they should carry on their duties and how the territory should be divided and the details of that, do you recall that?

A. Yes, sir.

Q. Mr. Held as manager helped work out those contracts? A. Yes.

Q. That was an important part of the sale of insecticide and fertilizer for the company throughout the territory? A. Yes sir, it was.

Mr. Trask: I believe that is all.

Redirect Examination

By Mr. Laney:

Q. This matter that counsel brought out from you about some lumpy material, what was that?

A. That is your insecticides. The year before we had had trouble due to things—not our fault at the plant as far as we knew and we were just getting ready to start a new season and we wanted to make sure that our material was free and that it was good when we started the season.

Q. Where was it that you did what work you did on that?

(Testimony of Lehi B. Palmer.)

A. Upstairs in the mill office was where we [325] first came in and we talked about it and discussed it because we were having——

Q. That was at the plant?

A. At the plant, down at the feed mill plant it is. Then we made one or two trips over into the insecticide department where we obtained samples of our materials. We took them back, tested them and examined them and one of the boys was asked to go out and buy a sample of other dust and bring it in. Then one meeting we first brought up the problem, the next meeting we brought up the dust and went over to the plant and got our samples, then the meeting was postponed because Joe Huron wasn't there. He was asked to come in and sit in on this final meeting that we had as far as eliminating our lumpy dust.

Q. That was all there at the plant?

A. Yes.

Q. And Mr. Held was there? A. Yes, sir.

Q. Now as to the contract with the field men that opposing counsel asked you about, was that worked out before Mr. Held came here?

A. They had had it typed out and made up, yes, sir, but it was gone over and adjusted or changed in his presence at his request. [326]

Q. And who had worked that out?

A. That I couldn't say. I presume that Mr. Wahmsley, our man at the plant, was the one who worked it out.

Mr. Laney: No further questions.

JOHN N. KLEINZ

called as a witness by and on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination

by Mr. Laney:

Q. What is your name, please?

A. John N. Kleinz.

Q. What is your position?

A. I am in charge of the west side district.

Q. For this same company? A. Yes.

Q. Which company is that?

A. I believe I am paid by the Southwest Cooperative.

Q. Being supervisor of that district what do you do?

A. Well, I am in charge of insecticide, fertilizer and anything that we keep on that side.

Q. And you sell to whom, to the farmers?

A. To the farmers, yes. [327]

Q. You heard the testimony of Mr. Holmes here, did you? A. Yes.

Q. And did you know of any other field trips that Mr. Held ever made other than those that Mr. Holmes and Mr. Palmer testified about?

A. The only field trips that I would know about were the ones that I was on. He was out in Buckeye one day, another time in Glendale.

Q. And the one at Buckeye, do you know whether that was the same day as the one at Chandler?

A. I believe it was. They shipped the equipment

(Testimony of John N. Kleinz.)

from Chandler to Buckeye and got there in the afternoon.

Q. And the one at Glendale, who else was present there? A. Besides Mr. Held?

Q. Yes, which foreman or supervisor?

A. Well, I was there. That is all I could account for on that. Mr. Held was there too, of course.

Q. And that was a demonstration of what?

A. A cotton chopper.

Q. Do you know whether that was the Glendale one that was spoken of by Mr. Holmes or not? There [328] was one in Glendale.

A. He did refer to the Glendale demonstration.

Q. Was there just the one Glendale demonstration of that?

A. There was just one demonstration in Glendale, yes.

Q. Was there any other time that Mr. Held was out on your area during this time from April 1 to June 20?

A. I can recall the time when Mr. Held and Mr. Holmes and myself went out to make an adjustment on barley—grain.

Q. Was that the barley trip that was testified about by Mr. Holmes, the same matter or one of them? A. Yes, I believe it is.

Mr. Laney: That is all.

Testimony of John N. Kleinz.)

Cross-Examination

By Mr. Trask:

Q. I don't recall, my notes don't show Mr. Holmes testifying about any trip out to make any adjustment on barley, Mr. Kleinz. When was that?

A. Well, now, that is a good question. I don't know when but Mr. Holmes and Mr. Held and I went out to see Trombley on adjustment on [329] train.

Q. What was the occasion for that trip?

A. There was a complaint on it and it was in my area. We sold them barley and they got 21½ orders of barley and the rest was oats and we were trying to determine the cause.

Q. Did you request Mr. Held to go out there with you as the manager to help work out the problem?

A. I requested Mr. Held through Mr. Holmes who was my superior.

Q. And he did go out there on that trip with you?

A. Yes, we talked it over beforehand and then went out.

Q. Did he take an interest in the affairs of the company on this occasion and other occasions when you were out with him working out problems?

A. Yes.

Q. This particular trip on the barley, how many times did you go out to see Mr. Trombley?

(Testimony of John N. Kleinz.)

A. I went out with Mr. Held and Mr. Holmes only once that I can recall.

Q. You don't remember when Mr. Held went out on any other occasion at all?

A. No, I wouldn't know.

Q. Was that problem adjusted [330] satisfactorily?

A. I didn't hear any more about it after that.

Q. And you likewise were familiar with a great many of these other trips that Mr. Palmer and Mr. Holmes have testified to. You were along on some of those too, were you not?

A. I was on one in Casa Grande and one, maybe two, in Chandler, yes.

Q. Mr. Held, so far as you could observe in these trips, displayed a good general knowledge of agriculture and farming problems, did he not?

A. I would say so, yes.

Mr. Trask: That is all.

Mr. Laney: That is all.

IRVIN D. TWAY

called as a witness by and on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Irvin D. Tway.

Q. What is your position?

A. Area manager for Pinal County.

(Testimony of Irvin D. Tway.)

Q. That is for the Southwest Co-Operative Wholesale? [331]

A. And the United Producers and Consumers.

Q. You are area supervisor of what?

A. Mr. Holmes is my immediate supervisor. I am an area manager for Pinal County, in charge of sales.

Q. In the sale of what?

A. Sale of all the products that our company handle.

Q. That which company has?

A. United Producers and Consumers Co-Operative.

Q. Well, what is it that you sell mostly?

A. Insecticides, fertilizers, farm supplies.

Q. Were you in that position during the entire time that Mr. Held was supposed to be manager?

A. Yes, sir.

Q. Did you ever see him on any field trips or trip? A. Yes, sir.

Q. When, as near as you can fix it was that and where did he go?

A. On some of the trips that Mr. Holmes has mentioned I saw him on some of those. I wasn't on all the trips that the other boys made and one other time he and Mr. Holmes came to Casa Grande and I saw him on that time. [332]

Q. Was there any trip that he made into your field that you know of other than those that have been testified to? A. No, sir.

Q. What did he do on that trip?

(Testimony of Irvin D. Tway.)

A. As I recall, Mr. Holmes stopped by and met them at the office down there in Casa Grande and he and Mr. Holmes stopped by and visited with me for a little while, an hour or so, I imagine, and asked how everything was getting along and so forth and then they took off and went on to make some other contacts for farmers.

Q. Spent about an hour with you, you say?

A. I would imagine something like that.

Q. What did he come for?

A. Wanted to know what the situation regarding insecticides and fertilizers were down there.

Mr. Laney: That is all.

Mr. Trask: I have no questions.

PAULINE McINERNEY

called as a witness by and on behalf of the Defendants, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Laney: [333]

Q. Now, Mrs. McInerney, there has been talk of so-called informal meetings of the Board of Directors that was called—held on May 7, 1947. Do you know why that was called?

A. That meeting was called by Mr. Essley for May 27.

Q. May 27?

Testimony of Pauline McInerney.)

A. And he came into the office on Monday, which I guess would be the 26th, as he usually did, he would come in two or three times a week and check and see if things were going all right and asked about Mr. Held and I told him that he had gone east, stating he was going to bring his family here and that I had assumed he had checked with Mr. Essley and Mr. Essley stated at that time——

Mr. Trask: I am going to object to conversation between this witness and Mr. Essley not in the presence of defendant, hearsay.

The Court: All right.

Q. Then were all the members of the Board that you could reach notified of a meeting?

Mr. Trask: I object to that question, it calls for a conclusion whether they were notified. She can testify what she did or knows about it.

The Court: She can testify as to what [334] she knows.

Q. What do you know?

A. I notified all of the Board with the exception of Mr. Dana Fisher who lived in Glendale and we called the meeting on Tuesday morning. That would not have given him sufficient time to get over here and I had called the residence of Mr. Knox the week previously on Wednesday to notify him of the meeting for that Friday and at that time his mother answered the phone——

Mr. Trask: I am going to object to conversation not in the presence of defendant.

The Court: Yes.

(Testimony of Pauline McInerney.)

Q. Were you able to notify Mr. Knox?

Mr. Trask: Same objection, if the Court please.

The Court: She doesn't know whether she was or not. She called his home and talked to his mother.

Q. Counsel asked about that meeting, what was discussed at that meeting of the Board?

A. The contract——

Mr. Trask: Is this the meeting where Mr. Held was present?

Mr. Laney: No, this was the informal [335] meeting of May 27.

Mr. Trask: Object to the testimony regarding that meeting. It is self-serving, not in the presence of this defendant. He is not bound by it. Hearsay.

The Court: I think so.

Q. When was the next board meeting held?

A. A special meeting was called for June 9.

Q. And what was the purpose of that meeting?

A. To consider a manager's contract.

Q. And who were present at that meeting?

A. The board members were there, I believe, with the exception of Mr. Dorman and after the meeting had started the employees that ordinarily were at the Board meeting were excused.

Q. Were you excused? A. Yes, sir.

Q. When was the next board meeting held?

A. The next board meeting was called for June 20.

Q. What was the purpose of that?

(Testimony of Pauline McInerney.)

A. Called for the purpose of dismissal of the manager.

Q. Did you keep the minutes of that meeting?

A. I did. [336]

Q. There was introduced in evidence a letter from Mr. Essley on behalf of each of the companies notifying Mr. Held of the resolution there and one of those letters is Plaintiff's 4 and reading, "Mr. Emil Rovey made motion that in view of the fact that the members of the Board are of the opinion that Mr. Ralph W. Held was never legally employed and the illegality of his employment has only recently been discovered by the Directors and in view of the fact that he has never fulfilled the terms of the contract, that his purported employment be declared at an end. Motion seconded by Mr. Ralph Ashby and passed."

Is that in that letter a true copy of the resolution that was passed at that meeting?

A. I believe so.

Q. Well, did you write that out? A. Yes.

Q. Is it a copy of it? A. Yes.

Q. I will ask you to look. You said you believed so. A. It is.

Q. And the same resolution was in Plaintiff's Exhibit 5, set out, that is on behalf of the [337] other company, the Southwest Co-Operative.

A. That is right.

Mr. Laney: May it please the Court, at this time I feel I should offer in evidence the Articles of In-

(Testimony of Pauline McInerney.)

corporation of these companies. It has some bearing on the issues.

(Discussion off the record.)

Mr. Laney: Then at this time I offer in evidence a certified copy—certified, that is, by the local county recorder, photostatic copy of the original Articles of Incorporation of Southwest Co-Operative Wholesale and next, may it please the Court, I offer in evidence a like certified copy of the amendment to the Articles of Incorporation of the Southwest Co-Operative Wholesale.

Mr. Trask: When was that amendment made, Mr. Laney?

Mr. Laney: I think it was made after the start but—

The Witness: It was passed April 24, 1952.

Mr. Trask: Object to it. It was made after the contract.

Mr. Laney: Very well. In that connection would the Court hear me just a moment? [338] I feel that since it covers some of the future that is asked to be brought into this, that that would be relevant as showing what could be or is net income and what is not. It has some bearing on that and it does cover from thence forward. I ask that the amendment to the Articles that I have, the certified copies, be marked for identification.

(Defendant's Exhibit H marked for identification.)

Testimony of Pauline McInerney.)

(Defendant's Exhibit I marked for identification.)

Mr. Laney: I think if the Court should later see the relevancy of this I should make formal offer now. I do offer in evidence now Defendant's Exhibit H for identification, being the amendment to the Articles of Incorporation of Southwest Co-Operative Wholesale, which amendment was filed with the Corporation Commission on the 24th day of March of 1953.

The Court: How could it have been filed in March when it wasn't adopted until April?

Q. Did you say it was adopted in April?

A. Yes, it was adopted April 24, 1952, and then was filed with the State in March, 1953.

The Court: The following year?

The Witness: Yes. [339]

Mr. Laney: I beg your pardon. I think I was reading the certificate of the Commission.

The Court: All right.

Mr. Laney: I do make offer.

Mr. Trask: To which the plaintiff objects.

Q. Mrs. McInerney, during the time—how long have you been with these companies?

A. Since January, 1939.

Q. And then what have you been doing, what have been your duties with the company?

A. At the present time I do all the buying of the items for the Farmer Service Division which in-

(Testimony of Pauline McInerney.)

cludes the insecticide raw materials, the fertilizer materials, the feed.

Q. A little louder, please.

A. The feed concentrate proteins and grains, the items for the seed department, the items necessary for the maintenance of the machinery and the operation of the business and also assist in carrying out the policies of the Board in supervising the various departments which, according to my office of assistant secretary——

Q. I believe it has come out in evidence heretofore that you keep the minutes of the [340] meetings? A. Yes.

Q. Of the Board of Directors, and how long have you been doing that?

A. Since I started in 1939.

Q. Can you tell us from the minutes of the Board of Directors of Southwest Co-Operative Wholesale who the members of the Board of Directors of that organization were on March 6 of 1942, when the resolution was made about employment of Mr. Held?

A. I have them listed there on that piece of paper.

Q. Some of these documents here? A. Yes.

Q. Now that paper you are consulting, is that a tabulation that you yourself have made up from the official record? A. That is right.

Q. Now, who were the members of the Board of Directors of Southwest Co-Operative Wholesale then at that time? This is in March of 1952?

A. W. L. Smith and W. S. Dorman. I. F. Col-

Testimony of Pauline McInerney.)

er, Jack Click, Emil Rovey, Orville Knox, Dana Fisher and D. O. Essley. There were two vacancies in the Board at that time due to the resignation of Mr. Martin on the 28th day of February and due to the death [341] in February, of Mr. W. F. Moore.

Q. Taking those in order, is this the tabulation you were testifying from?

A. Yes, except I have the date here of January and I have eliminated the ones who were not there.

Q. How long was each member of the Board elected under the Bylaws and the actual election?

Mr. Trask: Object. The Bylaws speak for themselves.

The Court: It is three years.

Mr. Laney: I think the bylaws——

The Court: It has been testified to.

Q. Now then, when was the first one of those that you mentioned? Give his name and state when he was elected, what his term was.

A. Mr. W. L. Smith is the one who was first elected and Mr. Smith would have been re-elected or would have run for office in 1952. However, due to his death——

Q. Well when was he elected then?

A. He was elected in 1949.

Q. And his term would have been up in 1952?

A. 1952.

Q. On what date in 1952 would it have [342] been up?

A. The date of the annual meeting.

Q. When was that, normally?

(Testimony of Pauline McInerney.)

A. The meeting was normally in October.

Q. Well, when did his term begin? What month?

A. It would have begun at the annual meeting in 1949.

Q. The term that he was serving in, when did it commence? Did it run from what date?

A. The date of the annual meeting, whenever that would be.

Q. Well, when was the annual?

A. October, always.

Q. Then from October—Mr. Smith's term was from October of 1949, to October of 1952, was it?

A. That is right.

Q. Now, what other director or directors if any were in that same category—that is, that their terms were from October of 1949, to October of 1952?

A. Mr. C. M. Martin and Mr. W. S. Dorman.

Q. Were there some directors whose terms then ran from October of 1950, until October of 1953?

A. Mr. Collier, Mr. Moore, who is since deceased, and Mr. D. O. Essley were elected in 1950, in [343] October.

Q. And their terms would expire then in October? A. Yes.

Q. Was there a set of certain directors whose terms ran from a later date?

The Court: '51 would be the next.

Mr. Laney: Yes, thank you.

A. October, 1951, was Mr. Dan Fisher, Mr. Jack Click, Mr. Emil Rovey and Mr. Orville Knox.

Q. And they would expire then in——

(Testimony of Pauline McInerney.)

A. In 1954.

Q. Now, the three-year terms of the purported contract with Mr. Held then was from April 1 of 1952? April 1, 1952, to April 1, 1955, was it?

A. It was for a 3-year term, yes.

Q. Now, as to the Board—you were talking of the board of United Producers and Consumers?

A. No, Southwest Co-Operative.

Q. Southwest Co-Operative Wholesale. Now as to the Board of Directors of United Producers and Consumers, how many members of the Board were there, according to the Bylaws of that?

A. There are 7.

Q. And here in March and April of 1952, I will ask you to give the names of the directors and [344] their several terms showing when they began and when they would expire as to that company.

A. The first group were elected in October of 1950. That was Mr. D. O. Essley, Mr. W. S. Dorman.

Q. Did they hold for three year terms likewise?

A. Yes, sir, 1951, October, Mr. Jack Click and Mr. Ralph Ashby were elected, served three year terms, 1952. Mr. I. F. Collier, Mr. John Biggs and Mr. Holly Smith were elected to serve three year terms.

Q. When you say they were elected did their terms begin in those months? A. Yes, sir.

Q. At the time when Mr. Held was purportedly manager there from April 1, June 20 of 1952, what

(Testimony of Pauline McInerney.)

records and reports of the corporations were kept in your office and under your supervision?

A. The summaries of most of the information was in my office which would be available to the Board or anyone who wanted to see them and I had the weekly analysis of the farm service division with daily sales of all departments, the weekly inventories at the feed mill, the daily inventories at the insecticide department, the daily sales at the insecticide department and the truck reports showing the daily deliveries and operation of the vehicles for each day for the [345] feed mill, insecticide and fertilizer departments, the lumber yard, the furniture and petroleum departments.

Q. And I will ask you whether those records were during all of this time kept in your office?

A. That is right.

Q. Now, I will ask you whether you were there all of the time during the time that Mr. Held was ostensibly manager?

A. Yes, sir, I was.

Q. And during that time did he ever ask for any of those reports or consult any of them?

A. No, he did not.

Q. Are those records of the condition of the various departments—did he ask to consult any of those?

A. No, sir.

Q. Did you have records then of the inventories and prices of raw material for insecticide, fertilizer and seed?

A. Yes, sir.

Q. Did he ever discuss with you or ask you for any of those inventories for this period?

Testimony of Pauline McInerney.)

A. No.

Q. About what volume was the sales—[346]
about what volume of raw materials was purchased
per year at that time?

A. The departments which I bought for which
includes all the departments in the farm service
division will be approximately \$2,000,000.

Q. And approximately what percentage of the
business of the company did the farm service cover?

A. Approximately 65%.

Q. Were there any major suppliers of material
to the company that attempted to see Mr. Held while
he was supposed to be manager?

A. I recall only one. The west coast representa-
tive for the Gidy Corporation came in one afternoon
and waited approximately two hours, before I knew
he was there, for Mr. Held said that he had written
to his——

Mr. Trask: I object.

Q. Was he able to see Mr. Held?

A. He was not.

Q. Was Mr. Held there? A. He was not.

Q. Had he told you or left any word where he
was? A. No, sir.

Q. Did this man come back and try to see [347]
him?

A. Yes, he came back the next day and I had
informed Mr. Held he wanted to see him and when
the gentleman came in Mr. Held was not there.

Q. You had informed Mr. Held that he wanted
to see him? A. Yes.

(Testimony of Pauline McInerney.)

Q. But Mr. Held didn't show up the next day?

A. He was not there when the gentleman came.

Q. Was he able to see him at all?

A. No, sir.

Q. And this man was, you say, a major supplier of what?

A. Gidy Corporation is a producer of DD² mainly. Used in insecticides.

The Court: Wanted to sell something?

Q. About what percentage of the business is in the insecticide department?

A. Approximately 25%.

Q. You heard some testimony about this barley deal where there was some mixup about wild oats. Was that settled while Mr. Held was there?

A. No, it wasn't.

Q. When was it settled, if you know?

A. Oh, I would imagine sometime in the [348] middle of July.

Q. And what was done in that regard? Who did it?

A. It was settled in that we had the county agent's office and go to see Mr. Tromley and explain——

Mr. Trask: I don't see any material bearing on this, in July what the details are.

Q. Then it wasn't settled by Mr. Held?

A. No, sir.

Q. During the time that Mr. Held was there did he do anything that you could observe there in the normal way of discussing with department heads

(Testimony of Pauline McInerney.)

and with regard to the management and the conduct of it, just what did you observe in that regard?

A. He did very little because he was there very little of the time. He did hold two staff meetings, one about the middle of May and one about two weeks later and other than consulting with Mr. Huber, a few times, that was about the extent of what I could see that he did with the operation of the business.

Q. In the running of the business I will ask you to state whether you have observed whether it is necessary for the manager to be there to co-ordinate affairs and to discuss things with the heads of departments? [349]

Mr. Trask: Object. Calling for a conclusion. Incompetent, immaterial.

The Court: Yes.

Mr. Laney: You may take the witness.

Cross-Examination

By Mr. Trask:

Q. Mrs. McInerney, you have the bylaws of the United Producers and Consumers there in your possession? The minute book, excuse me, I misspoke myself; you have the minute book of the United there? A. Yes.

Q. You say you kept the minutes of both corporations? A. That is right.

Q. Do you know that the bylaws of the United have been amended from time to time by the Board at its regular meetings, do you not?

(Testimony of Pauline McInerney.)

A. Yes, sir.

Q. With respect to the Board of Directors of the Southwest Consumers, most of the members of the Board have been there and been on the Board serving successive terms by re-election since the company was incorporated, have they not?

A. I believe we have six directors at the present time who are different since the time of [350] incorporation—just a moment and I will count them. On the Board of 10, in 1944, at the time of incorporation only 4 of those directors remain.

Q. Referring to Defendant's Exhibit G in evidence, which is the certified copy of the Articles of Incorporation of Southwest Co-Operative Wholesale, Article 1 of the Articles sets out the names of the incorporators, does it not? A. Yes, sir.

Q. The first one is W. L. Smith?

A. Yes, sir.

Q. He served until the time of his death, successive re-elections, did he not? A. Yes, sir.

Q. The next is Mr. W. F. Moore. He served by successive re-elections until his death?

A. Yes, sir.

Q. Mr. W. S. Dorman is the next and he is still on the Board? A. He is deceased.

Q. When did Mr. Dorman pass away?

A. In April of this year.

Q. Then he served until his decease by successive re-elections? A. Yes. [351]

Q. Mr. I. F. Collier is one of the incorporators,

(Testimony of Pauline McInerney.)

Q. Is he still on the Board? A. Yes, sir.

Q. Mr. John Butler is no longer on the Board?

A. No, sir.

Q. The next one is Mr. D. O. Essley, he is still on the Board? A. Yes, sir.

Q. Harry F. Michael, he is no longer on the Board? A. No, sir.

Q. Did he die? A. Yes, sir.

Q. Did he serve until his death?

A. Yes, sir.

Q. Mr. Orville Knox is still on the Board?

A. Yes, sir.

Q. Mr. C. M. Martin, he is the only one who has resigned?

A. That is right. Mr. Butler and Mr. Martin are no longer on the Board.

Q. They served until they resigned by successive re-election? A. That is right. [352]

Q. Now, the same situation substantially controls with respect to the United Producers and Consumers, does it not?

A. There were 5 incorporating directors. We have since added to—we have a board of 7 at present.

Q. Let me show you Defendant's I in evidence, the Articles of Incorporation of the United Producers and Consumers. The names of the incorporators are Mr. W. S. Dorman, Click, Essley, Smith, Collier. All of those are still directors except two who have died, is that not true? A. Right.

(Testimony of Pauline McInerney.)

Q. They all were incorporators and served by successive re-elections up to the present time?

A. Yes.

Q. Except for the ones deceased, they are still serving? A. Yes, sir.

Q. Actually, so far as you know, they will be re-elected for successive terms hereafter?

A. There is no way of knowing.

Mr. Laney: Speculative.

The Court: Oh, yes.

Q. With respect to this supplier, Mr. Gidy, [353] who sold DDT, you had a contract at the time with the company for the DDT, did you not?

A. Yes, sir.

Q. He was just there trying to sell a product?

A. He was there at the request of his employer to whom Mr. Held had written advising that he was here for Southwest Co-operative Wholesale.

Q. Did you tell Mr. Held what time he was coming in or make an appointment?

A. No, sir, I did not know. I told him he would be in in the morning.

Q. You say you wrote these letters notifying Mr. Held of the action of the Board of Directors of the two companies dismissing him?

A. Yes, sir.

Mr. Laney: You mean she typed them?

Q. Yes, you typed them. Calling your attention to Plaintiff's Exhibit 4, this recites that at a meeting of the Board of Directors the United Producers passed a resolution that began, "Mr. Emil Rovey

testimony of Pauline McInerney.)

the motion"—so forth and so forth—Mr. Emil Rovey wasn't even on the Board, was he?

. No, he is not. I imagine the names were interchanged. We will check with the minutes of [354] meeting.

. Take a look at it. Was Mr. Emil Rovey on Board of United Producers? A. No, sir.

. Actually he couldn't have made any motion for dismissal for United, could he?

. No, sir, however the minutes would indicate.

. As far as your notice of dismissal then, it is error, is it not? A. As to name, perhaps.

. Mrs. McInerney, you say Mr. Held did conduct staff meetings on at least two occasions in 1934? A. Yes.

. That is at which time the heads of the departments were invited in for staff meetings, consultations? A. Some of the heads were, yes, sir.

. And you said that he did consult Mr. Huber from time to time?

. Yes, I would have no knowledge of the exact time.

. Mr. Huber is the man who is in charge of the various departments down there, is he not?

. Yes, sir, from the retail angle. [355]

. He is still there? A. Yes.

Mr. Trask: I believe that is all.

(Testimony of Pauline McInerney.)

Redirect Examination

By Mr. Laney:

Q. As to this error about Emil Rovey, will you turn to the minutes of the United Company there of June 20? I will ask you to read the full motion as shown by the minutes of the United Producers and Consumers from your minute book relative to that matter. A. (Motion read.)

Q. Then the letter of notification—did it simply copy the resolution in the other minutes?

A. Yes, it was just interchange of names in the two companies.

Q. And so then have you the minutes of the Southwest Co-operative Wholesale of the same date?

A. Yes, sir.

Q. I will ask you whether the letter that is in evidence as Plaintiff's No. 4—I will ask you whether the two meetings were held together, the meetings of both companies together? [356]

A. The Southwest was held first and the United immediately following.

Q. What was the resolution, just the resolution part of the other company, the United?

A. "Mr. Rovey made motion that in view of the fact that the members of the Board of Directors are of the opinion that Mr. Ralph W. Held was never legally employed and the illegality of his employment has only recently been discovered by the Directors in view of the fact that he has never fulfilled

testimony of Pauline McInerney.)

terms of the contract that his purported employment be declared at an end."

Mr. Laney: That is all.

Recross-Examination

Mr. Trask:

Q. I neglected to ask you a question about the contract that Mr. Smith and Mr. Held prepared. Respective of what the source of it might have been you were present when Mr. Smith and Mr. Held together dictated and agreed upon the terms of the contract which you wrote and Mr. Smith signed, were you not?

A. Mr. Held dictated certain terms which were incorporated in the contract and Mr. Smith signed it.

Q. They both agreed they were both [357] present at the time the provisions were being dictated and agreed to them, did they not? A. Yes, sir.

Q. I presume you keep accurate record of the minutes and who is present at the various meetings, are you not? A. Yes, sir.

Q. Would you refer to your minutes of April and state to the Court whether or not Mr. Lewis Ahmsley was present at the meeting of April 3?

A. Yes, sir.

Q. It shows that he was? A. Yes.

Q. That is the meeting at which the minutes of the meeting of March 6 were read and approved?

A. Yes, sir.

(Testimony of Pauline McInerney.)

Q. And the minutes of March 6 which were read and approved contain the resolution of the corporation authorizing Mr. Wahmsley and Mr. Smith to work out the terms of employment?

A. Yes, sir.

Q. The minutes of United likewise show Mr. Wahmsley was present at the meeting of April 3?

A. Yes, sir.

Q. With respect to this telegram at this [358] meeting did I understand you to say that Mr. Laney drew that telegram?

A. Yes, sir.

Q. He was present at the meeting of May 27 and prepared the telegram?

A. No, sir, he was not.

Q. You employed Mr. Laney then to prepare the telegram that was sent?

A. Mr. Essley on Monday when he came into the office and asked about Mr. Held and at that time looked at the contract, took the contract to Mr. Laney and asked his advice.

Q. And was this meeting held in Mr. Laney's office, this meeting of the 27th?

A. No, sir, it was not.

Mr. Trask: I believe that is all.

Redirect Examination

By Mr. Laney:

Q. Do you have any remembrance whether Mr. Wahmsley was present at the first part of this meeting of April 3?

Mr. Trask: Object to the question as calling—

testimony of Pauline McInerney.)

attempt to impeach the minutes, statement of his
n witness.

A. I wouldn't be able to say he was present
[359] all the meetings.

Q. You don't remember whether he was there?

Mr. Laney: That is all.

Mr. Trask: No further questions.

Mr. Laney: The defense rests, your Honor.

(The regular noon recess was taken.) [360]

The Court: You may proceed.

JAMES LEONARD

led as a witness by and on behalf of the Plaintiff
rebuttal, being first duly sworn, testified as fol-
ws:

Direct Examination

Mr. Trask:

Q. Will you state your name, please?

A. James Leonard.

Q. Where do you live?

A. 4225 North 42nd Street in Phoenix.

Q. What is your occupation or profession?

A. Certified public accountant.

Q. Mr. Leonard, were you ever employed by the
defendant corporations or either of them—that is
United Producers Consumers or Southwest Co-
operative Wholesale?

A. Yes, sir, I was the office manager for them.

Q. During what period of time was that?

A. May, 1950, to April 30, 1952.

(Testimony of James Leonard.)

Q. '52 or '53? A. '53.

Q. You have now your own accounting business?

A. Yes. [361]

Q. During that time did you have occasion to know Mr. Held, Mr. Ralph Held, the plaintiff in this action? A. Yes, sir.

Q. As office manager what were your duties there, Mr. Leonard?

A. Well, generally was to supervise accounting and pricing departments and to see that the work was performed and reports forwarded to the proper people.

Q. As office manager, was it your office that had charge of the statistical information, that is the monthly sales and the monthly income and the expense and all of those items? A. Yes, sir.

Q. And did you prepare from time to time reports for the use of the officers and directors as to the progress of the company in a statistical way? That is, their sales and volume and expense and profit and so forth? A. Yes, sir.

Q. Do you know whether or not during that time—did you ever furnish that information to Mr. Held? A. Yes, sir, I have.

Q. Did he as far as you could observe seem [362] to take an interest in the financial progress of the company and its affairs as far as the statistics and bookkeeping and auditing and accounting is concerned? A. Yes, sir.

Mr. Laney: Object to his leading the witness.

The Court: I think he might answer that.

Testimony of James Leonard.)

Q. Mr. Leonard, in that connection let me show you Plaintiff's Exhibit 13 for identification. Do you recognize what that is?

A. Yes, sir, it is an analysis of the sales for the month of April, 1951, comparison between '51 and '52 for the month of April.

Q. Who prepared that? A. I did.

Q. Is that in your handwriting?

A. Yes, sir.

Q. At whose request did you prepare it?

A. At Mr. Held's request.

Q. What was it prepared to show?

A. It was prepared to show the reason the net margin was not so great although the sales volume had increased.

Q. During what month? [363]

A. During the month of April, 1952.

Q. It was an analysis that you prepared of sales volume during April at Mr. Held's request?

A. That is right.

Q. Did you deliver it to him for that purpose?

A. Yes, sir, I did.

Mr. Trask: I offer it in evidence. It is offered, the Court please, for the purpose of showing by way of rebuttal that Mr. Held did take an interest in the reports.

Mr. Laney: No objection.

(Plaintiff's Exhibit 12 received in evidence.)

Q. Showing you 12 in evidence which is the report you just testified about, Mr. Leonard, during

(Testimony of James Leonard.)

the course of your preparation of this, did you have any conversations with either Miss McInerney or Mr. Wahmsley? Did either of them come around and see you preparing this? A. Yes, they did.

Q. Did Mrs. McInerney come around and see you preparing this? A. Yes, sir.

Q. Did she have any comment to make to [364] you or ask you why you were preparing it?

A. Yes, she asked me.

Q. Did you tell her that you were preparing it at the request of Mr. Held?

Mr. Laney: Object to leading the witness.

A. I did say that.

Q. And what was her comment to you at that time?

A. The comment at that time was that——

Mr. Laney: Object to that as calling for hearsay, not trying to impeach anything, wasting time.

Mr. Trask: The purpose of it is to show that an officer of the corporation made the suggestion that this information need not be gotten to Mr. Held. That is the purpose.

The Court: Well, all right, go ahead.

Q. What was the comment that was made at that time? What did she say?

A. She said it wasn't necessary to make that report.

Q. For Mr. Held? A. That is right.

Q. Nevertheless, Mr. Held asked that it be [365] prepared and you prepared it?

A. That is right.

(Testimony of James Leonard.)

Q. Do you know whether or not during the time you were there did you observe Mr. Held holding staff meetings?

A. Yes, sir, he held two that I know of and both of them I attended.

Q. How about regarding payroll records and paying raises and approval of raises—did Mr. Held have anything to do with that to your knowledge?

A. Yes, sir; he signed all cards authorizing increases in salary for the employees of the firm.

Q. Those cards were delivered to him by whom?

A. By Ernest Huber.

Q. Do you keep down there such a thing as a ten-day daily sales report?

A. Yes, sir.

Q. What are those?

A. They are reports of the volume of business done for each ten days during the month and it is followed by department up and down by department and whether or not it is also a member sale or non-member sale or through an agency. [366]

Q. Who prepares those?

A. The bookkeeper. United Producers bookkeeper prepares the report and gives it to me.

Q. That is under your supervision and direction?

A. Yes, sir.

Q. Do you know whether any of those were delivered to Mr. Held?

A. Yes, sir, I took the first one after he was brought into Mr. Held and showed it to him.

Q. Do you know anything about the weekly feed

(Testimony of James Leonard.)

price list and revising the mailing list? How is that handled?

A. Well, before Mr. Held came we had a mailing list on feed prices, approximately 200 names of people and due to the reduction in the volume of sales and trying to work to increase it, Mr. Held was interested in enlarging the mailing list and also contacting more people, getting it out to the general members.

Q. Did he work with you in that regard?

A. Yes.

Q. Did you see him work with any other people in the organization in doing that?

A. Well, no, sir. I didn't see him working [367] directly with any other people although I know he did because they asked me concerning costs of certain operations.

Mr. Trask: I believe that is all.

Cross-Examination

By Mr. Laney:

Q. Now, calling your attention to Plaintiff's Exhibit 13, what is it you call that?

A. It is a comparative statement of operations April, 1951, with April, 1952.

Q. When was that prepared?

A. Approximately shortly after the middle of May and probably around the 19th or the 20th.

Q. 19th or the 20th of May?

A. That is right.

(Testimony of James Leonard.)

Q. But there is no such statement of that sort prepared for Mr. Held before that?

A. There is a monthly statement of operations showing the volume of sales and so forth. It is a monthly report showing margin and also the whole organization financial picture and operations for the month go in to him each month and on the basis of that report is the reason for this.

Q. Now, when did he ask for those reports?

A. For which ones? [368]

Q. The ones you are talking about.

A. The monthly reports were due on the 20th of each month.

Q. Isn't it a fact that he started asking for these shortly after June 9 chiefly?

A. No, sir.

Q. Now, do you say that this document, Plaintiff's Exhibit 13, was a document that you showed Mrs. McInerney and she said not to give it to Held?

A. I didn't show it to her; she came to my desk for other purposes and saw that I was working on it and asked me why and I told her.

Q. When was that?

A. In the morning I was preparing it.

Q. When? What month?

A. That was in May.

Q. About what time in May?

A. About the 20th of May.

Q. You are sure it wasn't about the 27th of May?

A. Well, it was before the monthly board meet-

(Testimony of James Leonard.)

ing in May and it was shortly after the preparation of the monthly report so it would have to have been right about the 20th of May. [369]

Q. Now, when did you give this to Mr. Held, if at all?

A. I gave it to him the same day I prepared it.

Q. And when did you finish preparing it?

A. The same day he asked for it. He asked for it in the morning.

Q. I mean what date of the month?

A. Well, if the monthly report was given to him on the 20th in the evening then I prepared it on the 21st. If it was another day—actually I don't recall just what day the 20th is. If it was more—if it was Monday, Tuesday or Wednesday—it might be a Sunday but it was——

Q. You recall you stated to Mrs. McInerney, did you not, that Wahmsley, the auditor, was not to see the report before the board meeting. You remember that, don't you?

A. No, sir, I did not. I did not say anything like that to Mr. Wahmsley. He did see the report.

Q. No. Didn't you say to Mrs. McInerney that Mr. Wahmsley was not to see this report before the board meeting?

A. No, sir; he saw that report before the board meeting. He saw it while I was preparing it. [370]

Mr. Laney: No questions.

Mr. Trask: No further questions.

JOHN W. BLAKE

called by the Plaintiff as a witness in rebuttal, being
first duly sworn, testified as follows:

Direct Examination

Mr. Trask:

Q. Where do you live?

A. 8118 North 38th Drive.

Q. What is your present occupation?

A. Office and credit manager.

Q. For what concern?

A. Firestone Tire and Rubber Company.

Q. You are appearing here under subpoena?

A. Right.

Q. Mr. Blake, were you ever employed by either
the United Producers and Consumers or the South-
west Co-operative Wholesale? A. Yes, sir.

Q. Were you employed by those corporations
during the time or a portion of the time that Mr.
Ralph Held was the manager? A. I was.

Q. What were you doing? What was your work
at that time? [371]

A. I was handling the advertising and mer-
chandising for the company.

Q. As such who did you work with principally?
Who was your immediate superior, the man you
worked with? A. Ernest Huber.

Q. And Mr. Huber was the man in charge of
the various stores and retail outlet divisions of the
United, is that correct? A. That is right.

Q. In connection with your work as advertising

(Testimony of John W. Blake.)

manager or in charge of sales did you have any occasion to work with Mr. Ralph Held during the time he was manager? A. I did.

Q. What did you do?

A. Well, we set up a different advertising program than what we were under previously to his employment there. We signed a contract with Arizona Farmer for space for their advertising once every two weeks.

Q. And did you do some advertising in any other mediums?

A. In the Arizona Republic and Gazette we made a couple advertisements in there. [372]

Q. In working out your advertising program with the farmer—Arizona Farmer, who worked with you on that? A. Mr. Held.

Q. Did you make trips away from the office with Mr. Held and work that program out?

A. We made three trips, I believe, to Arizona Farmer.

Q. And with respect to your advertising in the Republic and Gazette prior to the time Mr. Held came there, had there been any advertising in the Republic and Gazette?

A. Not during my employment.

Q. What was your particular purpose in wanting to advertise in the Republic and Gazette at this time?

A. Well, we had an overstock of tires in a couple of sizes and we thought that if we could reduce the price and still make a substantial markup and get

Testimony of John W. Blake.)

them in an advertising medium that would reach the people, that we could move some of the tires.

Q. Had you been successful in getting an advertising program prior to Mr. Held's coming there that would sell the tires? A. No, sir.

Q. After he came there did you consult [373] with him about your ideas about advertising program? A. I did.

Q. The—as a result of that consultation what did he authorize you to do?

A. He authorized me to, I believe we run one or two ads in the Republic and Gazette, authorized both of those and he authorized the signing of the contract with the Arizona Farmer for one year's time.

Q. What was the result of your advertising program in the Republic and Gazette?

A. Well, we sold an awful lot of tires.

Q. Would you say it was successful or unsuccessful? A. I would say it was successful.

Q. Did you see Mr. Held around there from time to time during the time he was employed there?

A. Yes, sir.

Q. As far as you know did he appear to take an interest in the affairs of the corporation as far as you could observe?

A. He did in my case I know and I know of a few times where he was out with field men.

Q. The field men would be men like Mr. Tway and Mr. Holmes and Klein and those people? [374]

A. Yes, sir.

Q. You have seen them out on those trips?

(Testimony of John W. Blake.)

A. No, I have never seen them out. I heard from his secretary, I believe that he was out.

Mr. Trask: I believe that is all.

Cross-Examination

By Mr. Laney:

Q. When did you first go to work there?

A. I went to work there April 10, 1950.

Q. And in whose department were these tires?
Who was the head of that department?

A. I suppose Ernest Huber was.

Q. What department was it, the hardware?

A. It was the hardware department.

Q. Wasn't Bill Eden head of that?

A. I never took any orders from Bill Eden. I took mine from Ernest Huber directly.

Q. You are talking about the success of some ads in the Republic and the Farmer. You still had an overstock of tires after that was over, didn't you?

A. Yes, sir, but we had a terrible overstock when he started.

Mr. Laney: That is all.

Mr. Trask: No further questions. [375]

RALPH W. HELD

Plaintiff, having been previously sworn, resumed the stand and testified in rebuttal as follows:

Direct Examination

By Mr. Trask:

Q. Mr. Held, in connection with the testimony in defendant's case it has been brought out to some extent that you didn't have available reports. Did you take the time to check the reports and documents reflecting the business of the corporation from time to time during the time you were there?

A. Yes, sir.

Q. How were those reports made up?

A. We had several kinds. We had the monthly reports that we used in board meetings and we had ten-day sales reports that I was guided by mainly.

Q. And were there balance sheets and other statistical documents prepared by the bookkeeping and auditing department?

A. Yes, sir.

Q. Did you ever have any of those furnished to you or check them or investigate them at any time?

A. The ones that I mentioned were furnished me regularly.

Q. I will show you Plaintiff's Exhibit 14 [376] and ask you to state what those various reports are?

A. Those are the monthly reports, the balance sheet and the opening statement and sales analysis and also an operating cost analysis for the months of April, 1950—April, 1951; April, 1952; May 10, 1951, and May, 1952.

(Testimony of Ralph W. Held.)

Q. And did you ask that these be given to you and did you consult and study them during the time you were manager?

A. Yes, sir; those were a report that had been in use before I came there. I didn't change it particularly but I reviewed them prior to each of the board meetings when they were presented.

Mr. Trask: I offer it in evidence.

Mr. Laney: No objection.

Mr. Trask: Offered for the purpose of establishing the witness' interest in the corporation.

(Plaintiff's Exhibit No. 14 received in evidence.)

Q. Mr. Held, in addition there is one little item I would like to bring out. Did you learn of some problem during the time you were there the early part of your management of the corporation concerning your oil sales or the oil of the corporation, petroleum products? A. Yes, I did. [377]

Q. How did you come to learn of that problem?

A. Well, at the time of my first call on Mr. Jack Click, a member of the board, sometime in April, I don't recall the exact date, we got to visiting about our petroleum operation and he mentioned to me that he didn't use the lubricating oils that the co-operative had for sale because he was a little fearful of what it might do to his equipment and with a statement like that from one of the directors I thought possibly I ought to check it so I took free

(Testimony of Ralph W. Held.)

samples and sent them to an independent chemical laboratory in Chicago for analysis.

Q. Did you receive an analysis from that laboratory?
A. Yes, sir.

Q. I show you Plaintiff's Exhibit 15 and ask you to state whether or not that is the analysis you received.
A. That is it.

Q. Did you do anything about this—make the information available to any member of the corporation?

A. I brought it up in, I believe, the May board meeting.

Mr. Trask: Offer it in evidence.

Mr. Laney: No objection. [378]

(Plaintiff's Exhibit No. 15 received in evidence.)

Q. Mr. Held, there has been some testimony regarding the size of the co-op organizations here. How do they compare in size with the organizations that you were managing in Iowa?

A. Well, the last year that I worked for the Iowa Farm Service Company their annual sales exceeded \$8,000,000.

Q. As compared to what volume of sales annually of the defendant corporation?

A. Oh, just very roughly, that would be twice the amount of the defendant corporation.

Q. And with respect to the corporation that you were managing in Iowa during the time you were here, the number of employees, what comparison do

(Testimony of Ralph W. Held.)

you have, how did they compare with the defendant corporation?

A. That depends on whether you take in the member companies of the wholesale that I was working for or whether you refer merely to the wholesale but since we are referring to both of them here I presume that I should refer to both of them back there.

Q. Well, on that basis how do they compare?

A. Well, we had about 250 salesmen and [379] 30 local company managers and, of course, the regular office staff under each company manager.

Q. As compared to here, they only have the two corporations and a few, one or two retail outlets?

A. That is right.

Q. Did the volume of business during your ten years as manager there increase or decrease?

A. The sales volume in dollars as near as I can remember it the first year or the year prior to the time I went there was approximately \$2,000,000 and it was about \$8,000,000 the year that I left.

Q. Was your leaving those concerns for what reason?

A. Well, I resigned effective March 15, 1952.

Mr. Laney: I don't see the relevancy of this.

Mr. Trask: The only purpose is there has been some question of the plaintiff questioning his qualifications. It is for that purpose.

Q. Now, Mr. Held, with respect to the contract that is in question here, did anyone ever, of the defendant corporation, board, officers or any mem-

Testimony of Ralph W. Held.)

Q. Now, ever state to you or suggest to you in any way that President Smith did not have complete authority to [380] execute the contract on behalf of the corporation? A. No, sir, they did not.

Q. Did anyone call to your attention or suggest that Wahmsley's approval or signature was necessary to the validity of this contract?

A. No, sir.

Q. Did Mr. Wahmsley ever say or do anything to suggest that the contract did not meet with his approval? A. No, he didn't in my presence.

Q. So far as you know did he appear—did he discuss the provisions of the contract with you during his negotiations and appear to approve them?

Mr. Laney: Object to calling for a conclusion.

Mr. Trask: I believe that is all.

Cross-Examination

By Mr. Laney:

Q. And you did not make any effort to find out what the terms of the resolution were that authorized Smith and Wahmsley to work out the terms of the contract with you, did you?

A. Not particularly, no.

Q. And you merely took Mr. Smith's word [381] for it that he had authority to make the contract, did you?

A. Well, he was president of the two corporations and I had met with him in a board meeting of both corporations and I think it is natural to assume

(Testimony of Ralph W. Held.)

that when he told me that he had that authority that he was correct.

Q. You remember now that he did take this resolution to Mrs. McInerney in your presence and hand it to her saying that it was the resolution about employing you and that she then said something about your employment. You remember that, don't you?

A. I was in Mrs. McInerney's office when Mr. Smith came in after the board meeting and he handed her something but nobody read it to me and I didn't read it and I wouldn't have had any way of knowing what it was.

Q. You do remember that Mrs. McInerney said something about we will be glad to have you come here as manager? A. Yes.

Q. Upon your memory being refreshed, wasn't it said that that was the resolution about the management?

A. I don't recall that anything was said about any resolution and nobody read any resolution to me. [382]

Mr. Laney: That is all.

Mr. Trask: No further questions. Plaintiff rests on rebuttal. At this time the Plaintiff moves for judgment on the pleadings and the evidence.

Mr. Laney: And, of course, we resist the motion.

(Date fixed for argument to the Court.)

(Whereupon, at 2:30 p.m. court was adjourned.)

I hereby certify this is a true and complete transcript of my shorthand notes.

/s/ GLORIA FRANDLE,
Official Reporter.

[Endorsed]: Filed March 29, 1954. [383]

Title of District Court and Cause.]

CLERK'S CERTIFICATE OF
RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Ralph W. Held, Plaintiff, vs. United Producers and Consumers Co-operative, a corporation, and Southwest Co-operative Wholesale, a corporation, Defendants, numbered Civ-1798 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the said original documents constitute the record on appeal in said case as designated in the Designations filed therein and made a

part of the record attached hereto and the same are as follows, to wit:

1. Plaintiff's Complaint, filed October 10, 1952.
2. Defendants' Answer, filed November 4, 1952.
3. Order for Judgment for the plaintiff, dated August 25, 1953, and filed August 26, 1953.
4. Plaintiff's Proposed Findings of Fact, Conclusions of Law, and Judgment, filed September 4, 1953.
5. Defendants' Proposed Amendments and Additions to Plaintiff's Proposed Findings, filed September 9, 1953.
6. Findings of Fact, Conclusions of Law, and Judgment, filed October 6, 1953.
7. Defendants' Motion for New Trial, Motion to Amend Findings, and Motion to Amend Judgment, filed October 14, 1953.
8. Order Modifying Judgment, filed February 24, 1954.
9. Stipulation and Order of Substitution of Attorneys of Record for Defendants, filed March 23, 1954.
10. Order Denying Motion for New Trial, Amending Findings of Fact in Part and Amending Judgment in Part, filed March 23, 1954.
11. Notice of Appeal, filed March 24, 1954.
12. Defendants' Supersedeas Bond on Appeal, filed March 29, 1954.
13. Reporter's Transcript of Record, filed March 29, 1954.
14. Defendants' Exhibits A, B, C, D, and G in evidence.

15. Defendants' Exhibits E, F, H and I for identification.

16. Plaintiff's Exhibits 1, 2, 3, 4, 5, 8, 9, 11, 12, 13, 14, and 15 in evidence.

17. Designation of Contents of Record on Appeal.

18. Order Extending Time for Filing of Record on Appeal.

19. Stipulation and Order of Substitution of Scoville & Linton as attorneys for Defendants.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$2.00 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and seal of said Court this 17th day of June, 1954.

[Seal] /s/ WM. H. LOVELESS,
 Clerk.

[Endorsed]: No. 14400. United States Court of Appeals for the Ninth Circuit. United Producers and Consumers Co-operative, a Corporation, and Southwest Co-operative Wholesale, a Corporation, Appellants, vs. Ralph W. Held, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Arizona.

Filed June 21, 1954.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14400

UNITED PRODUCERS AND CONSUMERS
CO-OPERATIVE, a Corporation, and
SOUTHWEST CO-OPERATIVE WHOLE-
SALE, a Corporation,

Appellants,

vs.

RALPH W. HELD,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY

The Appellants in the above-entitled action, pursuant to Rule 17 (6) of the above-styled Court, hereby present the following statement of the points on which they intend to rely on this appeal. (The parties will be referred to by the same designations as they appear in the District Court, Appellants as Defendants and Appellee as Plaintiff.)

The granting of judgment in favor of Plaintiff versus the Defendants and the failure to grant Defendants' Motion for New Trial and the failure to grant Defendants' Motion to Amend the findings and the rendering of judgment thereof are not justified by the record and are contrary to law, upon the following grounds and for the following reasons, to wit:

1. When a Board of Directors of a corporation by resolution authorizes its president and auditor to employ a person as general manager and work out the terms of the employment, that does not authorize the President alone to employ the manager and fix the terms of his employment and an attempted employment and agreement as to terms of employment by the president alone is unauthorized and does not result in a valid contract.

2. When the Board of Directors of a corporation authorizes its president and auditor to employ a person as general manager and work out terms of employment, that authorization implies an employment not in conflict with the articles of incorporation and bylaws of the corporation, and any attempted employment in violation of the articles and bylaws is beyond the scope of the authority of the agents and does not result in a valid contract.

3. The Board of Directors' action does not constitute an amendment of the bylaws in view of the statutory procedure for amendment as set forth in § 9-701, et seq., Arizona Code Annotated, 1939, which procedure is exclusive, and, therefore, any attempt to amend the bylaws, without following the statute, is void as against public policy and, further, no meeting was ever called by the corporations' Boards for the purpose of amending the bylaws, as provided in the bylaws.

4. The articles and bylaws of the corporations provide that the manager holds his office at the

pleasure of the Boards of Directors. Therefore, if the Boards did authorize the agreement, they acted beyond their authority and their acts, therefore, are void.

5. The attempted employment on behalf of a corporation of a general manager for a term which would extend beyond the terms of office of all of the Directors of the corporations, is contrary to public policy and does not result in any valid or enforceable contract, since one Board of Directors cannot bind subsequent Boards as to personnel to carry on the operation and management of the corporation.

6. The attempted employment for a definite period of years of a general manager, with said manager having power to employ and discharge all persons needed to carry on the business of the corporations is illegal and of no binding effect on the corporations, where it is shown that the articles of incorporation and bylaws provide that the affairs of the corporations shall be conducted by the Board and that the Board shall have the power to appoint and remove all officers and the power to appoint a manager who shall hold office at the pleasure of the Boards of Directors.

7. The Boards of Directors of the corporations did not ratify the contract.

8. If an alleged contract to employ a manager was beyond the powers of the Boards of the corporations to make, then such alleged contract cannot thereafter be ratified by the Directors of the cor-

orations so as to make the corporations liable hereunder, inasmuch as the Boards of Directors can ratify for their corporations only that which they could legally have done in the first instance.

9. The fact that one is dealing with a person whom he knows to be an agent is a danger signal and the person so dealing with an agent if he would find the principal must ascertain the extent of the agent's authority and if the agent lacks authority to make a purported contract and the person dealing with him knows or in the exercise of caution could ascertain that the agent lacked such authority, then the purported contract is not binding upon the principal.

10. There was a complete failure of performance under the contract by the Plaintiff, even assuming that the contract was valid and enforceable.

11. There was no ratification of the contract by the Boards for laches for the reason that upon discovering the terms of the contract, the Boards promptly notified the Plaintiff that their authority to enter into the contract and the contract was questioned and that in any case the contract was terminated.

12. There was no responsibility on the part of the Defendants for damages to Plaintiff, if any, inasmuch as Plaintiff had the obligation to learn the scope of the agency, the power of the Boards of Directors and the Plaintiff was promptly notified as to the validity of the contract.

13. In the computation of the damages by the Court, the percentage, in addition to the guaranteed salary, was improperly figured, inasmuch as the contract, if valid, provided a percentage on the net income and not on the net margin.

14. The allowance of \$500.00 for moving expenses was improperly allowed, inasmuch as there was no valid contract and the other damages allowed covered such item.

15. The Boards' authorization for the two officers to employ a manager is impliedly by law the authorization to employ in accordance with and not in violation of the articles and bylaws, the statutes of the state, common law and public policy.

16. The Boards of Directors could not have ratified the act of the President, inasmuch as the Boards did not know all of the essential facts.

17. There could have been no ratification of the contract since the Boards cannot ratify an illegal act and the owners of the corporations cannot be bound or damaged by the Boards' ratification of their illegal act, if there was a ratification.

18. The Plaintiff cannot claim ratification inasmuch as he did not use diligence in ascertaining the authority of the Boards and of their agents, inasmuch as he had actual knowledge of the limitations of the agents.

19. The contract was invalid as opposed to the statute of frauds as the contract was not signed by

all parties charged therewith or by some person lawfully authorized to do so, since Smith was not authorized by the Boards to act alone and the authorization, if any, did not allow for the hiring beyond the Boards' term and did not authorize the hiring of someone beyond the Boards' pleasure and did not authorize the hiring of a manager with the powers to hire and fire all employees, and the Boards could not authorize an amendment of the bylaws because of statutory law, common law and public policy.

SCOVILLE & LINTON,

By /s/ WALTER LINTON,

Attorneys for Appellants, United Producers and Consumers Co-operative and Southwest Co-operative Wholesale.

Receipt of copy acknowledged.

[Endorsed]: Filed June 18, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION ALLOWING EXHIBITS TO
BE CONSIDERED IN THEIR ORIGINAL
FORM

Come Now the Appellants by and through their attorneys and the Appellee by and through his attorneys, and stipulate and agree that all exhibits designated in the designation of the portion of the record to be printed on appeal may be considered by the Court in their original form without the necessity of reproduction in the printed record.

SCOVILLE & LINTON,

By /s/ WALTER LINTON,

Attorneys for Appellants.

JENNINGS, STROUSS,

SALMON & TRASK,

By /s/ OZELL TRASK,

Attorneys for Appellee.

[Endorsed]: Filed June 30, 1954.

No. 14400

IN THE

United States Court of Appeals

For the Ninth Circuit

1954 TERM

UNITED PRODUCERS and
CONSUMERS CO-OPERA-
TIVE, a Corporation, and
SOUTHWEST CO-OPERA-
TIVE WHOLESALE, a Cor-
poration,

Appellants.

vs.

ALPH W. HELD,

Appellee.

Appeal from the United
States District Court for
the District of Arizona

BRIEF OF APPELANTS

SCOVILLE & LINTON

Attorneys for Appellants

FILED

SEP 20 1954

PAUL P. O'BRIEN

TABLE OF CONTENTS

	PAGE
JURISDICTION	1
STATEMENT OF THE CASE	2
SPECIFICATIONS OF ERROR RELIED UPON.....	5
SUMMARY OF ARGUMENT.....	9
ARGUMENT	12

PART I

THE BY-LAWS PROHIBIT EMPLOYMENT OF A MANAGER FOR A DEFINITE PERIOD AND THE PLAINTIFF HAD ACTUAL KNOWLEDGE OF THE PROHIBITION.....	12
---	----

PART II

A CONTRACT FOR EMPLOYMENT OF A MANAGER OF A CORPORATION WITH FULL AUTHORITY FOR A TERM BEYOND THE TERMS OF THE THEN MEMBERS OF THE BOARD OF DIRECTORS IS VOID AND UNENFORCIBLE.....	21
---	----

PART III

THE TERMS OF THE RESOLUTION OF THE JOINT BOARDS REQUIRED SMITH AND WALMSLEY TO EMPLOY PLAINTIFF	25
---	----

PART IV

PLAINTIFF KNEW HE WAS DEALING WITH AN AGENT AND HAD THE DUTY TO ASCERTAIN THE AGENT'S AUTHORITY TO BIND THE CORPORATION.....	28
--	----

PART V

THE BOARDS OF DIRECTORS OF THE DEFENDANT CORPORATIONS DID NOT RATIFY THE CONTRACT.....	34
--	----

PART VI

PAGE

THE PLAINTIFF'S CONTRACT VIOLATES THE STATUTE OF FRAUDS AND IT IS THEREFORE VOID.....	37
--	----

PART VII

THERE WAS COMPLETE FAILURE OF PERFORMANCE UNDER THE CONTRACT BY THE PLAINTIFF WHICH WOULD RENDER TERMINATION OF THE CONTRACT, EVEN IF VALID, JUSTIFIABLE.....	38
--	----

PART VIII

THE DAMAGES, IF ANY, SHOULD NOT INCLUDE PER- CENTAGE OF "NET MARGIN" WHEN CONTRACT CALLED FOR PERCENTAGE OF "NET INCOME.".....	39
--	----

CONCLUSION	41
------------------	----

CITATIONS

Cases

	PAGE
<i>Brutinel v. Nygren</i> , 17 Ariz. 491, 154 P. 1042.....	29-30- 32
<i>Cameron v. Lanier</i> , 56 Ariz. 400, 108 P. 2d 579.....	31
<i>Cohen v. Camden Refrig. & Terminals Co.</i> , 129 N.J.L. 519, 30 Atl. 2d 428.....	18- 19
<i>Darrah v. Wheeling Ice & Storage Co.</i> , 50 W. Va. 417, 40 S. E. 373.....	17- 18
<i>Douglass v. Merchants Ins. Co.</i> , 118 N. Y. 484, 23 N.E. 806..	19
<i>Dorsey v. Strand</i> , 21 Wash. 2d 217, 150 P. 2d 702.....	27
<i>Edwards v. Keller</i> , 133 S.W. 2d 823.....	22
<i>Ignner v. States Realty Co.</i> , 223 Minn. 305, 170 A.L.R. 500, 26 N. W. 2d 464.....	28
<i>Farmers Co-Op. Exchange Co. v. Fidelity & Deposit Co.</i> , 149 Minn. 171, 182 N. W. 1008.....	34
<i>Fowler vs. Great So. Tel. Co.</i> , 104 La. 751, 29 So. 271.....	17
<i>Hunter v. Sun Mut. Ins. Co.</i> , 26 La. Ann. 13.....	17- 18
<i>Kerbs v. California Eastern Airways, Inc. — Del. —</i> , 90 Atl. 2d 652, 91 Atl. 2d 62, 34 A.L.R. 2d 839.....	17
<i>Kitchfield v. Green</i> , 43 Ariz. 509, 33 P. 2d 290.....	30
<i>Lewellyn v. Aberdeen Brewing Co.</i> , 65 Wash. 319, 118 P. 30	17
<i>Lois Grunow Memorial Clinic v. Davis</i> , 49 Ariz. 277, 66 P. 2d 238	30- 33
<i>Monaghan v. Barnes</i> , 48 Ariz. 213, 61 P. 2d 158.....	34
<i>O'Donnell v. James Sipprell</i> , 163 Wash. 369, 1 P. 2d 322....	24
<i>Rundell v. Farmers Coop. Co.</i> , 210 Mich. 642, 178 N.W. 21	19
<i>Selley v. American Lubricator Co.</i> , 119 Iowa 591, 93 N.W. 590	18

	PAGE
<i>State ex rel. Walker v. Mass.</i> , 4 N. J. Mis. R. 230, 132 A. 322	18
<i>Tucson Fed. Sav. & Loan Ass'n v. Aetna Inv. Corp.</i> , 74 Ariz. 163, 245 P. 2d 423.....	21
<i>Walker v. Mass. & W. Co.</i> , 104 N.J.L. 341, 140 A. 286.....	18
<i>Wright v. Warren Bros. Co.</i> 204 Fed. 231.....	17

Statutes

28 U.S.C. Sec. 1291.....	2
28 U.S.C. Sec. 1332.....	2
Chap. 49, Art. 7, Arizona Code Annotated, 1939.....	2- 14
Sec. 49-702, Arizona Code Annotated, 1939.....	12
Sec. 49-706, Arizona Code Annotated, 1939.....	14-16- 19
Sec. 49-708, Arizona Code Annotated, 1939.....	15
Sec. 49-711, Arizona Code Annotated, 1939.....	9- 15
Sec. 58-101, Arizona Code Annotated, 1939.....	37

Treatises

2 Am. Jur., Agency, 201, § 249.....	27
13 Am. Jur., Corporations, 866, § 881.....	24
13 Am. Jur., 872, § 891.....	31
145 A.L.R. 312.....	19- 20
145 A.L.R. 317.....	21
2 C.J. 668, § 218, Agency.....	27
14a C.J. 428, § 2279.....	17

IN THE
United States Court of Appeals
For the Ninth Circuit

1954 TERM

UNITED PRODUCERS and
CONSUMERS CO-OPERA-
TIVE, a Corporation, and
SOUTHWEST CO-OPERA-
TIVE WHOLESALE, a Cor-
poration,

Appellants.

vs.

RALPH W. HELD,

Appellee.

No. 14400

Appeal from the United
States District Court for
the District of Arizona

BRIEF OF APPELLANTS
UNITED PRODUCERS AND CONSUMERS
CO-OPERATIVE, a Corporation, and
SOUTHWEST CO-OPERATIVE WHOLESALE,
a Corporation

JURISDICTION

The above entitled proceedings arise upon an appeal from a judgment entered in an action by RALPH W. HELD, (hereafter called HELD) against UNITED PRODUCERS AND

CONSUMERS CO-OPERATIVE, an Arizona Corporation, (hereinafter called UNITED) and SOUTHWEST CO-OPERATIVE WHOLESALE, an Arizona Corporation, (hereinafter called SOUTHWEST). The complaint alleged damages in the amount of Twenty-five Thousand Four Hundred Fifty Dollars (\$25,450.00)) and was an action for alleged breach of contract.

The action is one between citizens of different states and the amount of controversy exceeds Three Thousand Dollars (\$3,000.00), exclusive of interests and costs. The jurisdiction of the District Court rested upon diversity of citizenship. 28 U.S.C., Sec. 1332.

The action was tried by the District Court sitting without a jury, upon the complaint of plaintiff. The District Court, by minute order, found the issues made by the complaint and the answer of defendants in favor of the plaintiff. Findings of Fact and Conclusions of Law were submitted by plaintiff and over objection of the defendants were approved and settled by the Court and Judgment entered finally in the amount of Nineteen Thousand Six Hundred Ninety-two Dollars and Sixty-eight cents (\$19,692.68), plus plaintiff's costs in the amount of One Hundred Seventy-two Dollars and Seventy-eight cents (\$172.78).

The judgment having become final, the present appeal is predicated upon 28 U.S.C., Sec. 1291.

STATEMENT OF THE CASE

The defendants are non-profit corporations organized by members in accordance with Chapter 49, Article 7, A.C.A. 1939, and, as their names indicate, are co-operative corporations. The defendant, SOUTHWEST, is a wholesale company organized with few members other than UNITED and UNITED is a retail organization composed of several thousand members. Prior to March, 1952, the defendants were looking for a manager

of both organizations and had previous discussion with the plaintiff concerning same. Thereafter, and on or about March 6, 1952, had a joint meeting of the Boards of Directors of both defendants and resolution was adopted authorizing the President of both defendants, one W. L. Smith, and Lewis G. Walmsley, to employ the plaintiff as General Manager and work out terms of employment. Mr. Smith was a farmer who apparently did not devote full time to the office of president and Mr. Walmsley was a Certified Public Accountant who had handled the business of the defendants since 1946.

Thereafter, on March 7, 1952, after 5:00 o'clock p.m., the plaintiff and Mr. Smith met at the office of the defendant and dictated a contract to Pauline McInerney, a copy of which contract is attached to complaint, reference thereto made in the findings of fact. (R6). The contract was signed that evening by Mr. Smith. Mr. Walmsley was not present when the contract was prepared and signed. Neither did Mr. Walmsley know he was authorized along with Smith to work out terms of employment. (R 194). Mr. Held advised Smith after signing that contract he had some other possible commitments and would take the contract back with him to Iowa and if he accepted the job he would mail the contract to Mr. Smith with his signature thereon. (R 72).

Thereafter, and on or about March 25, 1952, Mr. Smith died and after his death and on the same day, the contract was received at Mr. Smith's home, signed by Mr. Held. (R 288).

Prior to the signing of the agreement the former manager of the defendants had given to the plaintiff copies of the By-Laws of the two defendants and had presented to him copies of the Articles of Incorporation of the two defendants and Mr. Held was familiar with the provisions of the by-laws stating that the officers of the corporation held office at the pleasure of the Board of Directors. (R 103). The contract provided, among other details, that the plaintiff's employment would commence on April 1, 1952, was

to last for a period of three (3) years, and his annual salary was to be Ten Thousand Dollars (\$10,000.00) per year, plus two per cent (2%) of the net income of the corporations for the second and third years of the agreement. (R 6).

The Board of Directors of UNITED consisted of seven members each holding office for a three year term; the terms of three members expiring in October, 1952, two of them expiring in October, 1953, and two expiring on October, 1954; the Board of Directors of SOUTHWEST consisted of ten members, each holding office for a three year term; the term of office of three of them expiring in October, 1952; term of office of another three expiring in October, 1953, and the term of office of the remaining four expiring in October, 1954.

At the time of the resolution of March 6, 1952, authorizing the employment to be worked out by Smith and Walmsley, neither Walmsley nor Pauline McInerney was at the board meeting, although they had previously attended the meeting but were excused and the resolution was adopted in closed session of the joint boards. (R 283).

Thereafter, at a special meeting of the joint Boards, on May 27, 1952, the legality of his contract was questioned. (R 294). Thereafter, HELD returned to Phoenix and met with the joint Boards of both defendants on June 9, 1952, to discuss negotiations toward settlement of the contract which negotiations failed and thereafter, on June 20, 1952, at a board meeting, he was formally advised that the contract was terminated.

During the period from April 1, 1952, to June 20, 1952, the plaintiff was paid a total of Two Thousand Two Hundred Seventy-five Dollars and Sixty-five cents (\$2,275.65). Thereafter, on September 1, 1952, the plaintiff secured other employment at the rate of Six Hundred Seventy-five Dollars (\$675.00) per month and was presently engaged in that employment at the time of the trial.

The term "net margin" and "net income" of Co-operatives are not identical terms. "Net margin" is the difference between the cost of merchandise, operating expenses and the selling price and the item that is returned to the members by way of revolving fund certificates or cash. "Net income" is the amount upon which Federal taxes are paid by both corporations and is determined by the profit received from "non-members'" business. (R 190). Average of the net margin for years 1951, 1952 and 1953 was the sum of Three Hundred Nine Thousand Eight Hundred Thirty-three Dollars and Fourteen Cents (\$309,833.14). The net income was Twenty-one Thousand Seven Hundred Sixty Dollars and Fifty Cents (\$21,760.50). Thus 2% of the net income for single year is the amount of Four Hundred Thirty-five Dollars and Twenty-one Cents (\$435.21) whereas 2% of the net margin, as above described, is Six Thousand One Hundred Ninety-six Dollars and Sixty-six Cents (\$6,196.66).

SPECIFICATIONS OF ERROR RELIED UPON

I

The District Court erred in making Finding of Fact No. III for the reasons:

(a) That there is no evidence that Smith alone was authorized to negotiate and enter into said contract.

(b) Said finding is contrary to the evidence that Smith and Walmsley jointly were to employ the plaintiff and work out the terms of employment. In this regard evidence conclusively shows that Walmsley did not negotiate and enter into the contract on behalf of the corporations.

II

The District Court erred in making Finding of Fact No. IV for the reasons:

(a) The term of the contract exceeded the terms of office of all Board members and was not a reasonable term.

(b) There was no established practice of continuing directors in office that appeared either from the evidence, articles of incorporation or the by-laws.

(c) That although the by-laws provided for amendments thereto, such amendments could only be made in accordance with the provision of the by-laws and the applicable statutes of Arizona, neither of which was followed.

(d) That the by-laws could not be amended by implication or any manner contrary to the statutes.

(e) That the finding is contrary to all evidence in that there was no evidence that the by-laws were amended at the time of plaintiff's employment and that no meeting was called for amendment to the by-laws.

III

The District Court erred in making Finding of Fact No. V for the reasons:

(a) Such finding is contrary to the evidence which conclusively shows that Walmsley was authorized to work out the contract jointly with Mr. Smith.

(b) The finding is contrary to the evidence in that the Board did not have knowledge of the existence of the contract and the Board did not fail to object to it when it discovered the full facts surrounding its execution. However, when it obtained knowledge it objected thereafter within a reasonable time.

(c) Assuming that the plaintiff was not formally notified that Walmsley was supposed to approve the contract, the plaintiff

was legally bound to ascertain the authority of Mr. Smith and failed to do so and thereby had knowledge or means of knowledge of that requirement.

IV

The District Court erred in making Finding of Fact No. VI for the reason:

(a) That the finding is contrary to the evidence which shows that the plaintiff did not give his exclusive time to the affairs of the corporations and did not comply with all of the terms of the contract.

V

The District Court erred in making Finding of Fact No. VII for the reasons:

(a) Evidence shows contract was void. Therefore there was no wrongful termination.

(b) The evidence shows that the plaintiff did not properly manage the businesses and the termination thereby was justified.

VI

The District Court erred in making Finding of Fact No. VIII for the reasons:

(a) The contract was void since it exceeded the powers of the directors and no damages are allowable for termination of a void contract.

(b) The contract provided for two per cent (2%) of the net income of the corporations and not the net margin as is itemized in the finding.

VII

The District Court erred in making Conclusion of Law No. I for the reason that the contract was void and unenforceable.

VIII

The District Court erred in making Conclusion of Law No. II for the reasons that there is not sufficient evidence supporting the conclusion but the evidence shows to the contrary.

IX

The District Court erred in making Conclusion of Law No. III for the reason that it is contrary to the evidence and without support in the evidence in that it appears without material contradiction.

(a) Contract was contrary to the Statutes of Fraud.

(b) The contract exceeded the powers of the Board of Directors and was therefore void.

(c) That the contract was contrary to the By-laws, of which plaintiff had actual knowledge, and was thereby void.

X

The District Court erred in making Conclusion of Law No. IV for the reasons:

(a) The evidence was contrary to the conclusion inasmuch as any percentage was to be a percentage of the "net income" and not the "net margin" and that certain items of damage set forth in said conclusion are based upon "net margin".

(b) That the contract was void for the reasons set forth in Specification No. 9 and therefore no damages are allowable since the plaintiff was paid for services from April 1 to June 20, 1952.

XI

The District Court erred in entering judgment in accordance with the Findings of Fact and Conclusions of Law theretofore made by it for the reasons stated above.

SUMMARY OF ARGUMENT

The argument following is divided basically into four parts, although under eight headings. Arguments I and II deal with the question that the Directors did not have the power to authorize or enter into the contract sued upon.

First, because the by-laws, which were authorized by the Co-operative Marketing Statute of Arizona, provided that the manager and officers should serve at the pleasure of the board of directors. Thus, there was no power of the directors to enter into a three-year contract in violation of the by-laws. In this respect the public policy of Arizona was set forth in the Co-operative Marketing Statute. As to the by-laws, it provided they could be revised and amended only at the end of the contract period. Also that any member might bring charges against an officer or director if a petition signed by 10% of the members was forwarded herewith. Thereafter, the removal to be voted upon at the next regular or special meeting and the majority of the members could remove the officer or director. 49-711 A.C.A. 1939. It is pointed out in the Argument and admitted in the evidence that the plaintiff had knowledge of the Articles of Incorporation and the by-laws, and, of course, is presumed to know the statutory law of the state. Thus, reading into the contract the statutes of Arizona and by-laws of the corporation, the services of the plaintiff were terminable at will.

Second, for the reason that the contract is for a period beyond the terms of office of the board members of each corporation. The record clearly shows that the term of the last board member who was on the board of either corporation at the time the contract was executed, expired in October, 1954, whereas the contract under the three-year term ran to April 1, 1955. It is the contention of the defendants that a board may not bind a corporation for an employment contract for a term beyond the terms of the members of the board of directors, for to do so would actually bind subsequent board to not only the contract but to the policy of the existing board, and in effect would deprive the members and stockholders of the power to actually exercise the administration of the corporate affairs, to hire and fire employees and otherwise control the employment of the manager.

The next point covered in the Argument relates to the fact that the late president, Walter Smith, had no authority to enter into the contract. In this regard the resolutions of the Boards of Directors of both corporations provided that Smith and Walmsley, the auditor, were authorized to employ and work out the terms of employment with the plaintiff. The evidence showed that although there was some discussion with Walmsley he was not contacted on the day the contract was drawn up and executed by Walter Smith, president of the defendants. Evidence shows that, at that point, Walmsley had no knowledge he was to work out the terms of employment with Smith and Held. It should be pointed out further that the contract was not signed by Held on the date it was dictated but at a later date and then forwarded from Iowa to Smith's home and received a few hours after Smith's death.

The plaintiff knew that there was a board meeting on the day prior to the drawing up of the contract and knew that some sort of resolution must have been passed by the Board but did not ascertain whether or not Smith was authorized to execute the contract on behalf of the directors. Inasmuch as the Boards of

Directors themselves, as a body, did not negotiate the contract, Held was on notice that that authority had been designated to some one and made no effort to learn who was to negotiate and execute the contract. A simple question to the Assistant Secretary, to whom he dictated the contract, would have advised him that Smith and Walmsley jointly were to do so.

There was no ratification of the contract. The Board of Directors did not have authority to enter into a three-year contract and they did not have notice of the fact that it had not been executed in accordance with their resolutions. As soon as the Boards of Directors were aware of the facts, they held a meeting and formally, by wire, notified Held that the legality of the contract was questioned and thereafter, approximately sixty days later, this contract was definitely terminated.

The next point raised is the failure of performance on the part of Held and this is borne out by much evidence that he could not be found around the company's offices and he could only account for a few days time out of the period he was employed, and the directors felt that he was not the man for the job, seeing the way he attempted to perform.

The Court below gave damages based in part on 2% of the net margin of the defendants. In this respect, the contract provided for an annual salary of \$10,000 per year plus 2% of the net income of the defendants. In the vernacular of all co-operatives, net income and net margin have two distinct meanings. Net income is the amount received by the co-operative from non-members' business, whereas net margin is the gross amount of members' business less the actual cost of materials and operation. The difference, that is, the margin, is then returned to the members either in cash refund or revolving fund certificates. In the instant case, Held had worked for co-operatives since 1938. (R 56). He shows in his testimony he was familiar with the distinction between net income and net margin. He himself dictated

the terms of the agreement sued upon. Thus, if the plaintiff is entitled to damages and can overcome the hurdles of the previous argument set forth above, he is only entitled to damages figured on 2% of the net income of the defendants for the second and third years of his contract. In this regard, the statutes of Arizona, specifically 49-702 A.C.A. 1939, allow a co-operative to do business with non-members as long as it is not in an amount greater than the amount handled for members.

The Court below allowed for each of the second and third years \$6,196.66 based on 2% of the net margin for the average of the years 1951, 1952 and 1953. If 2% of the net income were figured, it would amount instead to \$435.21 for each of the second and third years.

ARGUMENT

I

The By-Laws Prohibit Employment of a Manager for a Definite Period and the Plaintiff Had Actual Knowledge of the Prohibition.

The By-laws of Southwest Co-Operative Wholesale, (Ex. B in evidence) of which the plaintiff had knowledge prior to the attempted making of the contract, in Article III, under the heading "Powers of Directors", provide that the Board of Directors shall have the following powers:

"1. To conduct, manage and control the affairs and business of the corporation and to make rules and regulations for the guidance of the officers and the management of its affairs.

2. To appoint and remove at pleasure all officers, agents and employees of the corporation, prescribing their duties, fixing their compensation and requiring from them, if deemed advisable, security for faithful service.

3. To appoint a manager who shall hold office *at the pleasure and upon the terms and conditions* fixed by the Board of Directors who shall exercise such powers and perform such duties as the Board of Directors shall delegate and prescribe." (Italics ours).

The By-laws of United Producers and Consumers Co-operative (Ex. C. in evidence) provide in Article V, under "Powers of Directors" as follows:

"Section 2. To appoint and remove, *at pleasure*, all officers, agents, and employees of the co-operative, prescribe their duties, agents, and employees of the co-operative, prescribe their duties, fix their compensation and require from them, if advisable, security for faithful service."

"Section 8. *The Board of Directors may, in its discretion, appoint a manager who shall hold office at the pleasure* of and upon terms and conditions fixed by the Board of Directors." (Italics ours).

The By-laws of UNITED further provide under Article VIII as follows:

"Section 1. The Officers of the Co-Operative shall be a President, a Vice President, a Secretary and Treasurer, *Manager and Counsel*. Provided, however, the Board of Directors may, in its discretion, combine the offices of Secretary and Treasurer into a Secretary-Treasurer, and may also make other administrative combinations and appoint such other administrative officers as the Board of Directors in its discretion may see fit to provide." (Italics ours).

The By-laws of SOUTHWEST under "Officers" Article V, provide as follows:

"The Officers of the corporation shall be elected by the directors and shall be a President, one or more Vice-presidents, a Secretary and a Treasurer. The Board may also appoint one or more assistant Secretaries, one or more assistant Treasurers,

a manager, and such other officer as it deems desirable to transact the business of the corporation. The president and vice-president, or vice-presidents, shall be members of the Board of Directors and if either shall cease to be a director at any time, he shall ipso facto cease to be such president or vice-president. Any two or more of said offices, except those of president and secretary, may be held by the same person." (Italics ours).

We have set forth the definition of Officers appearing in both corporations for the purpose of showing that a manager is an officer of the corporation, in each instance. Thus, the directors under the by-laws are specifically given the power to remove *at pleasure* all officers and in the case of the UNITED, Section 8 of Article V, specifically states the manager shall hold office at the pleasure of the Board of Directors. We think it worth repeating that the plaintiff had actual knowledge of these restrictions, that he had copies of the by-laws and was fully informed at the time of entering into the contract of the restrictions set forth in the By-laws. (R 103).

Chapter 49, Article VII A.C.A. 1939, relates to co-operative marketing and sets up the powers, rights and privileges of co-operative corporations. In this respect, it is seen that the "By-laws" are given particular attention in this statute, 49-706 A.C.A. 1939 reads as follows:

"Each association shall within thirty (30) days after its incorporation, adopt by-laws. A majority vote of the members, or their written assent, is necessary to adopt such by-laws. The by-laws may provide . . . the qualifications, compensation and duties *and term of office of directors and officers.*" (Italics ours).

The same section, that is 49-706, provides as to the method of amendment of by-laws as follows:

"Upon the termination of each contract period, the board of directors of the association may renew or revise the *by-laws*,

to be in effect for the next contract period, and such renewal or revision shall be the by-laws of the association after thirty (30) days notice shall have been given to the members, unless more than fifty (50) per cent of the members of the association have filed objections in writing.” (Italics ours).

It is worthy of note that the statutes provide that the By-laws may set forth the term of office of directors and officers. Section 49-708 A.C.A. 1939 provides that the affairs of the association shall be managed by the Board of Directors, elected by the members from their number. In reading the entire section on co-operative marketing under the Arizona law, we feel that the public policy of this state can be gathered from a reading of the entire section, particularly as to the protection of these associations from a long term contract of any officer, employee or director. The By-laws specifically state the officers and agents shall serve at the pleasure of the Board and of all of this plaintiff had knowledge. The Statutes indicate that that was the intention of the Legislature at the time of the enactment of the cooperative marketing law and in this regard we point particularly to section 49-711 A.C.A. 1939 which reads as follows:

“REMOVAL OF OFFICER OR DIRECTOR. — Any member may bring charges against *an officer or director* by filing such charges in writing with the secretary of the association, together with a petition for removal signed by ten (10) per cent of the members. The removal shall be voted upon at the next *regular* or *special* meeting and the association *may remove* by majority vote of the members. The director or officer shall be informed in writing of the charges previous to the meeting, and he, and the persons bringing the charges, may be heard in person or by counsel and present witnesses at the meeting. If the by-laws provide for election of directors by districts with primary elections in each district, then the petition for removal of a director must be signed by twenty (20) per cent of the members residing in the district from which he was elected. The board must call a special meeting of the members residing in that district to consider the removal of the director, and he may be removed by a vote of the majority of the members of that district.” (Italics ours).

In this regard the statute provides for removal of officers or directors and the method for removal of a director is somewhat different from that of an officer. The distinction is understandable when the statute requires that the directors must be members and the officers need not be members. Thus, if 10% of the members are dissatisfied with an officer they can file charges against him and his removal will be voted on at the next *regular* or *special meeting* and he may be removed by majority vote of the members. Certainly this is contrary to the theory that the Board of Directors can saddle the members with a long term contract. Whether or not there is a contract for a definite period the law provides that an officer can be removed by majority vote of the members.

The By-laws of UNITED provide for amendment thereof as follows:

"Article XIV By-Laws: These By-laws may be altered or amended at any annual or special meeting of the members called for that purpose. The written assent of a majority of the members shall be effectual to repeal or amend any by-laws or adopt additional By-laws without any meeting. The By-laws may be amended, altered or repealed by the Board of Directors at any regular or special meeting."

The By-laws of SOUTHWEST state as follows:

"Article VIII — Amendments: These By-laws may be amended by the majority vote of the Directors of the corporation at any meeting called for that purpose, except as limited in the Articles of Incorporation or by law."

However, if it could be interpreted that these by-laws provide for amendment contrary to Section 49-706, as set forth above, which we do not agree, it is a well known fact that a by-law which is repugnant to the statutes must give way to the statutes.

Kerbs v. California Eastern Airways, Inc.—Delaware—90 Atl.2d 652, 91 Atl. 2d 62; 34 ALR 839.

The general rule preventing the employment of a manager for a fixed term in violation of a corporate by-law is expressed in the following quotation from 14a C.J. 428 § 2279:

“* * * nor can they (directors) employ a general manager for a fixed period, for example by the year, under by-laws which hold that all officers of the corporation shall hold office during the pleasure of the board of directors.”

This text cites :

Wright v. Warren Bros. Co., 204 Fed. 231, and

Fowler v. Great So. Tel. Co., 104 La 751, 29 So. 271.

Darrah v. Wheeling Ice & Storage Co. 50 W. Va. 417, 40 SE 373, holds that where the statute and by-laws provided that directors shall appoint officers and agents, who shall hold their places at the pleasure of the board, the directors cannot appoint such an officer or agent so as to bind the corporation to keep him for a definite fixed period.

Llewellyn v. Aberdeen Brewing Co., 65 Wash. 319, 118 P. 30, holds that the Code of Washington provision that corporations shall have power to appoint officers, agents, servants and remove them at will, *constituted a part of a written contract* by a corporation for the employment of an attorney and manager for a term of years, and authorized the termination of the contract at will, *though no express provision for termination* was included therein. The court cites with approval the Sun Mutual Ins. Co. *infra* in which the attempted contract violated only the by-laws, and not any statute.

In *Hunter v. Sun Mut. Ins. Co.*, 26 La. Ann. 13, it appears that the plaintiff was employed by the defendant for one year from February, 1869, which he served, and that on the expiration of that term he was employed by the defendant for another year. He was discharged in April of the second year without cause, and brought his action to recover damages for alleged breach of the contract. There was a by-law of the defendant, giving the directors the right to remove the corporate officers at pleasure. It was held that the officer so employed was presumed to have known of the existence of the by-law, *that it was part of the contract*, and the law governing the parties' rights in that respect, and "therefore the plaintiff knew the precarious tenure of his position" and was not entitled to recover.

Other cases holding that persons who enter the employment of a corporation with either actual knowledge of the existence of a by-law authorizing the removal of an officer, agent or employee at any time, or with constructive notice thereof by reason of being a stockholder or officer of the corporation, are bound thereby, and must be presumed to have accepted employment subject thereto, even though employment purports to be for a specified period, are as follows:

Cohen v. Camden Refrig. & Terminals Co. 129NJL519 30
Atl. 2d 428

Selley v. American Lubricator Co. (1903) 119 Iowa 591, 93
NW 590

State ex rel. Walker v. Mass (1926) 4 NJ Mis R 230, 132
A 322

Walker v. Mass & W. Co. (1927) 104 NJL 341, 140 A 286

Darrah v. Wheeling Ice & Storage Co. (1901) 50 W Va 417,
40 SE 373

Douglass v. Merchants' Ins. Co. (1890) 118 NY 484. 23 NE 806, 7 LRA 822.

Rundell v. Farmers Coop etc. Co 210 Mich 642, 178 NW 21

An exhaustive study of the question is set forth in 145 A.L.R. 312, the principal case of which is *Cohen v. Camden Refrig. & Terminal Co.* supra. In that case the New Jersey court held that the plaintiff who was employed for the term of one year as general manager could not recover damages because he was discharged without cause before the expiration of the year, where a by-law of the corporation, of which he not only had knowledge, but for the adoption of which he had voted, authorized the Board of Directors to remove any officer, agent or employee at any time. In that particular case, the court stated:

"Our Corporation Act, among other things, provides (NJSA 14:7-6): 'Every corporation organized under this title shall have a president, secretary and treasurer, who shall be chosen by the directors or stockholders, as the by-laws may direct, and who shall hold office until others are chosen and qualified in their stead. *It may have other officers, agents and factors who shall be chosen in such manner and for such terms as the by-laws may direct.*' We have italicized the words of the statute that we consider important to this issue. By virtue of this language the corporation was authorized to regulate its affairs as it considered its business welfare required."

Thus 49-706 A.C.A. 1939 provides that by-laws may provide for the terms of directors and officers. The permissive word "may" is in both acts and we submit that it should be applied as it was applied by the New Jersey Court.

The Court further states as follows:

"Assuming then that the plaintiff had a definite term contract for the second year (although this is denied by the defendant and the minutes are concededly silent on the matter), nevertheless he must be held to have entered upon the con-

tract (particularly for its second year) with express knowledge of the provisions of the by-laws which made his tenure subject to cancellation at any time the Board of Directors so desired. His contract for 1940 did not supersede the by-law of the company which the plaintiff in 1939 voted to adopt."

The Annotation in 145 ALR at page 312 states the general rule is as follows:

"Generally, corporate by-laws are binding upon all the members of the corporation, as they are presumed to know them and to contract as members in reference to them. They also may effect those who deal with the corporation *with notice of its by-laws* or under such circumstances that they are bound to take notice thereof. And, although the general rule is otherwise, there is some authority to the effect that by-laws of a corporation are a part of its fundamental law, binding, not only upon the incorporators and the corporation, but also upon all those dealing with it. 13 Am.Jur. 290, Corporations, § 161."

Also the annotation at page 314 continues as follows:

"Likewise, one claiming to have been employed by an insurance company as premium ledger bookkeeper for a term of one year was held in *Hunter v. Sun Mut. Ins. Co.* (1874) 26 La Ann 13, not to be entitled to complain of his discharge before the expiration of such term of employment where the bylaws of the company provided that the tenure of all officers of the corporation should be during the pleasure of a majority of the board of directors, the court considering that such employee was an officer within the meaning of this by-law and that since the by-law was in force at the time of his original employment, he must be regarded as having known the precarious tenure by which he held the position and that the directors had a right to remove him at their pleasure even though he had discharged his duties faithfully."

In the Annotation at page 316 there is set forth exceptions and limitations on the general rule I have cited but the Annotation shows that the exception is where the contract was made by the

Board of Directors with power to amend or rescind the by-laws of a corporation and this is not true in this case inasmuch as the by-laws can only be revised or renewed at the end of each contract period and the contract period, for example, for UNITED was one year from March 1, 1952. (R 191-192). Also note 145 ALR Page 317 which reads as follows:

"And a contract of employment for a period specified period will not prevail over a by-law authorizing removal at pleasure where the board of directors making the contract *has no power to* amend or rescind the by-law. Thus, in *Fowler v. Great Southern Teleph. & Teleg. Co.* (1900) 104 La 751, 29 So 271, it was held that where the by-laws of a corporation were framed and adopted by its stockholders and there was no authority in the board of directors to adopt by-laws or to modify those adopted by the shareholders, and the by-laws provided that the officers of the company should hold office 'during the pleasure of the board', the board of directors would have no power to employ a general manager by the year, and that the facts that the general manager was chosen at the recurring annual election of officers and that the salary of the position was designated as so much per year would not of themselves sustain a contention that he was employed by the year at a yearly salary, and, therefore, that he could not collect his salary for the balance of the year after he had been discharged from office by the board."

II

A Contract for Employment, of a Manager of a Corporation With Full Authority, for a Term Beyond the Terms of the then Members of the Board of Directors is Void and Unenforceable.

The Supreme Court of Arizona apparently follows this rule.

The following is quoted from *Tucson Fed. Sav. & Loan Ass'n. v. Aetna Inv. Corp.* 74 Ariz. 163, 245 P.2d 423,

"The directors of the Tucson Federal are elected for a three-year term, while this contract was to remain in force and effect for ten years from the date of its execution. It is contended by Tucson Federal that the contract is void for the reason that it extends and binds the corporation beyond the terms of the then acting officers and directors. To support this proposition we are referred to *Edwards v. Keller*, Tex.Civ.App., 133 S.W. 2d 823; *Clifford v. Firemen's Mut. Benev. Ass'n.*, 232 App. Div. 260, N.Y.S. 713; *Massman v. Louisiana Mfg. Cooperage Co.*, 177 La. 999, 149 So. 886; *Kline v. Thompson*, 206 Wis. 464, 240 NW 128. We have examined those cases and find they all involve employment contracts whereby the corporate officers have attempted to employ a person for a period extending beyond their terms. *The courts held that the contracts were void because one board of directors cannot bind subsequent boards as to future personnel to carry out administrative details of the corporation. These cases limit the application of the rule to employment contracts, which we believe is sound.*" (Italics ours.)

Edwards v. Keller (Civ.App.Texas), 133 SW 2d 823, cited above by the Arizona Supreme Court, was a suit on behalf of an employe for damages for breach of contract of employment made by the president of a life insurance company, at \$1,000 per month. The contract was for two years after Oct. 1, 1932. On October 1, 1933, the executive committee and board of directors of the corporation reduced his salary to \$500.00 per month until May 15, 1934, at which time his employment was terminated.

This case is so close in point on this and other phases of our contention we feel compelled to set forth at length the language of the Texas Court.

"However, be that as it may, assuming for the purpose here that the directors did know, or that they even participated in the making of the contract, extending the employment of Edwards over the period of two years, we think such a contract was void, because of the lack of power in the directors and president to make it. The statute of this State (Art. 1323,

R.S., Vernon's Ann. Civ. St. art. 1323) expressly provides for the election of directors of a corporation annually, at the annual meeting of the stockholders, * * *. The by-laws of defendant also have similar provisions. Thus, by means of such annual election, the stockholders of the corporation are clothed with the ultimate power of direction in the administration of its affairs; they are the sovereigns of the corporation, and, where the terms of a contract extend over the tenure of the executive officers, thereby taking from the incoming board of directors, the power of stockholders of the corporation, the power of directing the corporate affairs, denying to them the ultimate and final power in such matters, such contracts are *void*. Neither the board of directors nor the president of the corporation can exceed the limitations placed upon them by the laws affecting the corporation. *The terms of the statute and the by-laws of the corporation are necessarily read into every contract made on behalf of the corporation*; therefore appellant, knowing the limitations of the corporate officers, and that the work to be performed by him was 'in such capacity as the corporation from time to time directs', and at a salary of \$12,000 a year, extending over a period of two years, is in no position to urge that the making of such contract came within the powers of such corporate officers. *The contract would deprive the stockholders and successive directors, within such period of time, of the power to exercise the administration of corporate affairs, to dismiss such employe, reduce his salary, and otherwise control his employment. We are of the opinion, therefore, that the contract was contrary to public policy*. So, if it can be said from the record that the directors knew that its president had entered into the contract at the time it was made, or that the board had thereafter ratified the same by express orders, we think their act in so doing would not and did not breathe life into the contract void ab initio. It is true that neither corporation nor an individual can accept services or property under an ultra vires contract, receive all its benefits, and then refuse to pay therefor; but, such is not the case at bar. The services rendered by appellant were paid for by the corporation, and, the contract being void, it was clearly within the power of the board of directors to change, alter or terminate the contract and dismiss appellant at will." (Italics ours).

The following statement of this rule is quoted from 13 Am. Jur., Corporations, pg. 866, Section 881:

"A board of directors has no power to appoint for a term of years officers and agents to positions of responsibility and trust in the management of corporate affairs and deprive a succeeding board of the power of removal. Even though the board of directors is authorized by statute or by law to appoint such officers or agents as the directors deem proper, who shall hold their places during the pleasure of the board, the board cannot appoint such officer or agent for a definite, fixed period; such officer is bound to know that he is removable at the pleasure of the board and that a contract for a definite period is executed without authority. This rule applies, for example, to one appointed the general attorney and assistant manager of a corporation. * * *"

O'Donnell v. James E. Sipprell, 163 Wash 369, 1 P 2d 322.

The Supreme Court of Washington held that a three year contract for employment was unenforceable by either the employee or corporation on grounds that under the Statute the corporation had the power to remove the officer at will. We recognize there is no specific statute in Arizona yet the statute allowing the board to fix the term of office of officers and the by-laws stating the officers and manager shall serve at will should bring forth the same conclusion. A hiring for a period beyond the terms of office of the Board members is much more serious where a statute and by-law prohibit it as is seen from the following quotation in the O'Donnell case where the court states:

"We held in *Llewellyn v. Aberdeen Brewing Co.* 65 Wash. 319, 118 P. 30, 31, Ann. Cas. 1913B, 667, that, notwithstanding the express contract of employment by the defendant of the plaintiff for an agreed term of three years, by virtue of the corporate powers prescribed by the statute above quoted, the employee could be removed by the corporation without rendering the latter liable for that portion of the employee's

salary which would fall due thereafter had his employment continued. We said: 'Ordinarily trustees of corporations in this state are elected annually. If they were authorized to appoint officers, agents and servants to positions of responsibility and trust in the management of corporate affairs, and extend their appointment over a term of years, and thus deprive succeeding trustees of the power of removal, they could by such procedure indefinitely perpetuate any business policy, one event that might be detrimental to the interests of stockholders who would be unable to obtain relief through the election of different trustees or by other methods. To avoid the possibility of such an arbitrary exercise and abuse of power, the Legislature conferred upon the corporation authority to remove its officers, agents, and servants at will. Appellant knew of this statutory authority when he entered into his contract of employment, that it would constitute a part of the contract, and that respondent could remove him at will. The trial judge held he could be so removed, and we fail to see how the statute is susceptible of any other construction. This conclusion is well sustained by authority'."

III

The Terms of the Resolution of the Joint Boards Required Smith and Walmsley to Employ Plaintiff.

The resolution of UNITED is as follows:

"Motion was made by Klick, seconded by Mr. Collier and passed unanimously *that Mr. Smith and Mr. Walmsley be authorized to employ Mr. Held as general manager and work out the terms of employment.*" (R284.) (Italics ours).

The resolution of SOUTHWEST is as follows:

"Motion was made by Mr. Collier, seconded by Ralph Ashby and passed unanimously *that Mr. Smith and Mr. Walmsley be authorized to employ Mr. Held as general manager and work out the terms of employment.*" (R 285). (Italics ours).

Thus the resolutions were for the joint action of both Smith and Walmsley, yet Smith and Held, without Walmsley, dictated and executed the contract (R 288 and R 72). The purpose of the joint action was even apparent to the trial court (R 164) and Walmsley testified he never agreed to the terms of the contract, did not know he was to negotiate it and would not have agreed to a three-year contract (R 194) and objected to the contract at the Board meeting of May 27, 1952, (R 195). Certainly there was a real purpose in having Walmsley negotiate jointly with Smith.

(Testimony of Ralph Ashby.)

"Q. Well now, what was your purpose in delegating this to Smith and Walmsley to work out the contract?

"A. Well, Wahmsley was our auditor, we (225) figured he was capable of making out a contract with him, and Mr. Smith being the president of the company, we figured he would be the man, the two of them should work it out together.

"Q. Well now, when was it that you first became aware of the claim that Mr. Wahmsley had not been consulted in the formulation of this contract? When did you first become aware of that?

"A. Not until the night of that meeting of May 27. (R 229)."

It is true Walmsley did discuss terms with Held before the signing but no terms were ever agreed upon by Walmsley—he did not negotiate the final contract and did not even know he was authorized to do so by the resolution. The picture present is fairly obvious: Held discussed employment with Walmsley but never came to an agreement, he then started working on Smith and when he had to leave town in a few hours, took Smith to

the office and "just happened to have a form of contract with him." It reminds one of the old story of the Mississippi River gambler who, in talking to a prospect, don't know anything about the little old game of poker, but "just happens to have a deck of cards with him". Why they avoided Walmsley is somewhat of a mystery and will be an unsolved one, because the lips of Smith have been sealed by death.

For the rule of law applicable we cite to the court the following:

From 2 Am.Jur.Agency, 201, Sec. 249, the following is quoted:

"An agency conferred on two or more persons by a single act of authorization is presumptively joint, in the absence of a clear showing of a contrary intent, and must be exercised jointly by the designated agents; but this presumption will give way to a clearly expressed intention that the agents shall have the power to act severally."

From 2 C. J. 668, *Agency*, Par. 218, we quote:

"Generally it is presumed that when a principal employs more than one agent to represent him in the same matter of business they are joint agents, the exercise of whose joint discretion is desired, and an act performed by one or by any number less than the whole is not such an execution of the authority as to bind the principal; if one dies or refuses to act the others have no authority under the joint power, and cannot bind the principal; * * *"

From the opinion in *Dorsey v. Strand*, 21 Wash 2d 217 150 P 2d 702, the following is quoted:

"It is a general rule that when authority is given to two or more persons to act as agents in a matter of a private nature,

it is presumed to be joint and all must act jointly in order to bind the principal . . . The rule is based upon the idea that the nature of the act to be done or the business to be transacted is such *that the principal desires to have the benefit of the combined experience, judgment, discretion or ability of all of the agents*. We find nothing in the manner of selecting the committee of three or the duties to be performed by them indicating any intent other than that they should act jointly," (Italics ours).

From the opinion of *Egner v. States Realty Co.* 223 Minn. 305, 170 ALR 500, 26 NW 2d 464, we quote the following:

"An agency conferred upon several persons by a single act of authorization is joint and must be exercised jointly by all the designated agents. An act done by a less number is void as against the principal. Trustees of German Evangelical Lutheran St. John's Congregation v. Merchants' Nat. Bank, 139 Minn 80, 165 NW 491; Rollins v. Phelps, 5 Minn 463, Gil 373. The principal is deemed to have bargained for the 'combined' personal ability, integrity, and other personal qualities of the agents. 1 Mechem, Agency, 2d ed., Par. 198."

The boards of directors did not authorize or approve the contract sued upon. They only authorized the president and auditor to employ the plaintiff and work out terms of employment. The authorities uniformly hold that such a delegation of authority to two agents requires the joint action and concurrence of both in order to bind the principal. If one fails to act for any reason, the other has no authority to act alone and cannot bind the principal. It is undisputed that the plaintiff procured the signature of the late president, W. L. Smith, to the manager's contract sued upon without knowledge or consent of the auditor, Walmsley.

IV

Plaintiff Knew He was Dealing With an Agent and Had the Duty to Ascertain the Agent's Authority to Bind the Corporation.

It is a cardinal rule of law that one dealing with a person he knows to be an agent must exercise due caution in ascertaining whether the agent is acting in the scope of his authority if he wishes to bind the principal. In the present case Held met the joint boards and he, Walmsley and McInerney were excused. After the meeting Smith came out with the written resolutions and in Held's presence handed them to McInerney. Certainly he could have ascertained if Smith had the authority with one simple question concerning the resolution. Instead however, he says he took Smith's word for it. Smith, of course, cannot reply to that. We could deduce from the facts that Smith told him, Walmsley would have to approve it finally but since there was no certainty of Held's accepting the employment that that detail could await Held's decision. Even without this deduction, Held was on notice that Walmsley had discussed many terms of employment several times but Walmsley was ignored, but available, at the time of the signing.

The Arizona Supreme Court has gone into this question many times and we submit to the court that under the Arizona cases the contract would not be binding on the defendants.

The Arizona Rule is set out in the following cases:

Brutinel v. Nygren, 17 Ariz. 491, 154 Pac. 1042.

"But where the nature and extent of an agent's authority is directly involved, it must never be lost sight of; and this cannot be too strongly emphasized, that it ultimately may be established only by tracing it to its source in some word or act of the alleged principal. The agent certainly cannot confer authority upon himself, or make himself agent, merely by acting as such, or saying that he is one . . .

"The mere fact that one is dealing with an agent, whether the agency be general or special, should be a danger signal, and like a railroad crossing suggests the duty to 'stop, look, and listen,' and if he would bind the principal is bound to

ascertain, not only the fact of agency, but the nature and extent of the authority, and in case either is controverted the burden of proof is upon him to establish it . . .

"Notwithstanding the difficulty in some cases of ascertaining the extent of an agent's power, the general rule is that a person dealing with an agent takes the risk. To the objection that no one would be willing to deal with an agent upon this basis Chief Justice Shaw said:

" 'This objection, we think, is answered by the consideration, that no one is bound to deal with the agent. Whoever does so is admonished of the extent and limitation of the agent's authority, and must, as his own peril, ascertain the fact, upon which alone the authority to bind the constituent depends. Under an authority so peculiar and limited, it is not to be presumed that one would deal with the agent, who had not full confidence in his honesty and veracity, and in the accuracy of his books and accounts. To this extent, the seller of the goods trusts the agent, and if he is deceived by him he has no right to complain of the principal. It is he himself, and not the principal, who trusts the agent beyond the expressed limits of the power; and therefore the maxim, that where one or two innocent persons must suffer, he who reposed confidence in the wrongdoers must bear the loss, operates in favor of the constituent, and not in favor of the seller of the goods.' *Massey v. Beecher*, § *Cush.* (57 Mass.) 511."

The ruling in *Brutinel v. Nygren* supra was followed and quoted at length in *Litchfield v. Green*, 43 Arizona 509, 33 P. 2d 290:

From *Lois Grunow Memorial Clinic v. Davis*, 49 Arizona 277, 66 P. 2d 238, we quote the following:

"As a corollary to these principles, it is generally accepted that when one deals with a known agent, he must exercise due caution in ascertaining whether the agent is acting within the scope of his authority, if he wishes to bind the principal . . .

"The test in cases where implied authority is relied up is whether, under all the circumstances of the particular case, the party relying on such authority acted as a reasonable and prudent man who knows that he is dealing with an agent, in ascertaining the extent of the authority of that agent . . .

"When an agent makes a contract ostensibly on behalf of a disclosed principal, without sufficient authority to do so, it is the agent and not the principal who is liable upon such contract, and in the present case plaintiff's remedy was against Dr. Sweek and not as against the defendant corporation . . . "

From *Cameron v. Lanier*, 56 Arizona 400, 108 P. 2d 579, we quote the following:

"The leading case in this jurisdiction on the relations of principal and agent, and the authority of the latter, is that of *Brutinel v. Nygren*, 17 Ariz. 491, 154 P. 1042, L.R.A. 1918F, 713, which has been followed consistently. The rule may be thus stated: A principal is not responsible for a contract which he has neither directly nor indirectly authorized, and when one deals with another, knowing him to be an agent, the burden is upon such person to prove the authority of the agent to perform the act on behalf of the principal. Even a general agent's authority is limited to that which is expressly conferred, broadened by the apparent authority upon which third persons dealing with the agent may rely to do all acts within the ordinary and usual scope of the business which the agent is empowered to transact. Nor can an agency be proved by the acts or declarations of the agent or a third person. In other words, one relying upon the act of an agent must prove affirmatively the authority of the agent to perform the particular act. This may be done either by showing direct authority or that the agent has the implied authority . . . "

The rule announced in these cases is set forth in 13 American Jurisprudence at page 872 — paragraph 891 as follows:

"The general rule of agency that a person dealing with an agent must use reasonable diligence and prudence to ascertain

whether the agent acts within the scope of his powers, and is therefore presumed to know the extent of the agent's authority, is fully applicable to persons dealing with another as the officer or agent of a corporation. When, for example, one deals with an agent of a corporation solely upon the latter's representations as to his own authority, the liability of the corporation depends not on such representations, but on the actual authority conferred upon the agent in the particular transaction."

There certainly was no apparent authority on the part of the president to employ Held for a period beyond the terms of office of all directors and fix his tenure in such manner as to violate the by-law. Held knew the by-laws provided that the boards could discharge any officer or employee "at pleasure" and that a manager if appointed should hold office "at the pleasure" of the boards.

Much less did the board represent or hold out to Held that Smith was authorized to make the contract in question. The information that Held depended upon, according to his own testimony, was solely what Smith told him as to his authority; and as was held in *Brutinel v. Nygren*, *supra*, the nature and extent of an agent's authority must ultimately be established only by tracing it to its source in some word or act of the principal, as the agent cannot confer authority upon himself merely by saying that he has authority and assuming to exercise it. The rule that secret instructions do not bind third parties dealing with a corporation in good faith, applies only where there was apparent authority traceable to the principal which justified reliance thereon by the third party and deceived him.

It is absurd to say that Smith had apparent authority to violate the by-laws, or that Held was justified in believing that Smith could bind the corporation in violation of its by-laws. Held was present when Smith gave to Mrs. McInerney, the assistant secretary who kept the minutes, the form of resolution which the boards

had passed, and if he didn't actually know its tenor, to say the least he was put on inquiry as to what Smith's actual authority was.

The simplest inquiry on his part to see this resolution would have shown him that the boards were relying upon the combined experiences, judgment, discretion and ability of both Smith and Walmsley to formulate the contract and that Smith alone had no authority to do so.

A fair statement of the rule relative to apparent authority is that there is apparent authority in an agent to do acts which such agent would ordinarily be expected to perform in the usual course of business of his principal, or which such agent has performed in the past with the acquiescence of the principal in such manner as to lead third parties to believe that he has authority to do them. Such extraordinary acts, never performed by the agent before, as violating the by-laws or trying to amend them by implication certainly cannot be said to have been done under apparent authority.

In the case of *Lois Grunow Memorial Clinic v. Davis* supra, it was held that when a person deals with a known agent he must exercise due caution in ascertaining whether the agent is acting within the scope of his authority if he wishes to bind the principal and that an officer who occupied a position analogous to that of general manager had implied authority to bind the corporation to the extent that such a general manager ordinarily had authority. From the opinion in this case the following statement of the rule is quoted:

"It is true that a corporation can act only by its agents, and the presumption is that an act pertaining to its ordinary business, when performed by its president, secretary, or general manager, is legally done, and is binding upon the corporation, yet no such presumption prevails *when the act done by such officers does not fall within the scope of the powers conferred upon and usually exercised by them* as part of the ordinary business of the corporation." (Italics ours).

To say that the making by the president of this extraordinary contract turning over to Held the exclusive power to discharge all employees of large organizations that had been built up over a period of years, and to entrench him in that power beyond the control of the directors in violation of the by-laws, not only during the terms of the present officers but for considerable time after their terms had expired, fell within the scope of the powers conferred upon and usually exercised by the president as a part of the ordinary business of the corporations, would reach the height of absurdity.

V

THE BOARDS OF DIRECTORS OF THE DEFENDANT CORPORATIONS DID NOT RATIFY THE CONTRACT.

We believe, without fear of contradiction, we can state that a corporation cannot ratify a contract it could not have entered into at its inception. *Farmers Co-op Exchange Co. vs. Fidelity & Deposit Co.*, 182 NW 1008, 1010, 149 Minn. 171. Also that there can be no ratification of an unauthorized act of an agent without full knowledge of the act by the principal. *Monaghan vs. Barnes*, 48 Arizona 213, 61P2 158.

As to the first point above mentioned we submit that our arguments I and II amply show the corporation could not have entered into a three-year contract with Held.

As to the second point we cite the following evidence from Director I. F. Collier:

"Q. You had never taken a look at the contract prior to that time?

"A. Didn't know there was one existing.

"Q. What did you think the meeting was for at the time Mr. Smith and Mr. Wahmsley were delegated to negotiate with him?

"A. We had never had a contract with a manager.

"Q. I know, but what were you delegating them to do? What did you think you were doing when you were delegating them?

"A. To make an agreement with Mr. Held.

"Q. Then you just didn't think it would be put to writing, is that what you meant to say?

"A. That is right.

"Q. You had never inquired about it?

"A. No."

(R 218).

Actually the plaintiff below indicated he did not rely on ratification although he believed it did exist. It could only exist if the following points were all in favor of the plaintiff:

1. That the Statutes of Arizona relating to the defendant, and the by-laws of the corporation, could be over-ridden by the contract.
2. The Board of Directors could make a contract which would tie the hands of future boards to the possible detriment of its members.
3. That the by-laws could be and were amended by implication in contravention of the Statute of Arizona and at a special meeting not called for that purpose.

As far as notice of facts to the Board were concerned Held testified as follows:

"Q. Did you ever after you came to work here on April 1 discuss with any of the members of the Board of Directors the fact that there was a contract that you claimed under that was signed by Mr. Smith alone?

"A. No sir, I didn't.

Q. And did you discuss that subject with Mr. Wahmsley?

"A. No sir, I assumed that was settled when we signed the contract (80).

"Q. And then you say the first intimation that you heard that the contract was questioned or the legality of it was in that telegram that was sent to you by Mr. Essley under date of May 27, which I see is Plaintiff's Exhibit 2 in evidence.

"A. Yes sir.

"Q. And Mr. Essley was the new president that had been elected after Mr. Smith died?

"A. That is right.

"Q. Now, between the time when the contract was signed by Mr. Smith on March 7, 1952, and the time of sending this wire, this telegram, Plaintiff's Exhibit 2 of May 27, between those dates did you discuss with any of the members of the Board of Directors the matter of how your contract was signed or who had signed it?

"A. No, I do not recall that I did.

(R 115)

Witness, D. O. Essley, now President, testified it was only a little while before the May 27th, 1952 meeting that he learned

Walmsley had not been consulted about the execution of the agreement (R 201, 202). Director Emil Rovey testified he never read the contract and it was not until the "last meeting" the facts about it were brought out. (R 223). Likewise, Director Ralph Ashby did not know Walmsley had not been consulted until the May 27th meeting, (R 229.) Therefore the evidence does show that the defendant did not have full knowledge of the unauthorized act of Smith until at or shortly before they notified Held that the legality of his contract was questioned.

We submit that under the facts there was no ratification of the contract by the defendant.

VI

THE PLAINTIFF'S CONTRACT VIOLATES THE STATUTE OF FRAUDS AND IS THEREFORE VOID.

It would appear that plaintiff is precluded from maintaining an action upon this manager's contract by the Arizona Statute of Frauds, being Section 58-101 A.C.A., 1939. This statute provides that "No action shall be brought in any court in the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and *signed by the parties to be charged therewith, or by some person by him thereunto lawfully authorized: * * * * 5.* Upon an agreement which is not to be performed within the space of one year from the making thereof." (Italics ours). Since the agreement was not to be performed within the space of one year it had to be in writing signed by someone lawfully authorized to sign it. Since W. L. Smith, acting alone, was not authorized to sign it, his act was void, did not bind either defendant, and did not satisfy the statute of frauds. An act done by only one of two joint agents is void as against the principal. *Egner v. State Realty Co. supra.*

VII

There Was Complete Failure of Performance Under the Contract by the Plaintiff Which Would Render Termination of the Contract, Even if Valid, Justifiable.

Inasmuch as there is not presented any acts of malfeasance against the plaintiff all of the evidence in support of this proposition is in the nature of observation and opinions of the Directors and certain employees. The one common complaint was that he was not spending enough time on the job.

The evidence, we submit, is clear that he spent very little time at the office of the company.

Department heads could not find him in when they wanted to confer with him. In explanation of why he was so seldom at the office or plant, he claimed that he was doing his duty as manager on certain field trips and other trips out of the office. But the only outside trips that could be accounted for as on company business amounted to some ten days out of the 2½ months that he was there.

It became manifest to all the directors, except Knox who was seldom at the office or plants, that Held was not paying enough attention to the job, that his lack of proper attention would tend to disrupt large organizations and injure the morale of their employees, and that for the welfare of the defendant corporations it was necessary to get rid of him. This situation was shown by the testimony of the new president Essley and by the other directors who testified, as well as that of such heads of departments as Joe Huron, Paul Hunt, Everett Barber, and Harvey Sims, and such other employees as the telephone switchboard operator and the bookkeeper.

Why should all the members of the Board of United Producers

and Consumers Cooperative and all the members except one of Southwest Cooperative Wholesale want to get rid of this manager whom they had been in favor of employing only about 2½ months before? They had no motive in the form of personal gain. There certainly is some explanation of their attitude. The explanation is, we submit, that Held was simply not attending to the job in a reasonable manner or doing the work embraced in the term "general manager."

VIII

The Damages, if any, Should not Include Percentage of "Net Margin" when Contract Called for Percentage of "Net Income."

The term "net margin" and "net income" in parlance of Co-operatives is as easily distinguishable to people in that business as black and white is to the ordinary person. Held had worked for and with Co-operatives for years—certainly he knew the distinction. Yet in the face of this the District Court determined net income to mean net margin which we submit is clearly error. Before going further, we want to reiterate that Held did the dictating (R 286 - R 335) of the contract that was signed by Smith.

The portion of the contract applicable reads as follows:

"Compensation for the second and third years of this three year agreement shall be at the rate of \$10,000.00 per annum plus two (2%) per cent of the net income of Company."

Thus the familiar rule of construction of contract should apply: i.e. more strictly against the person who prepares the wording. We see no ambiguity in the phrase "net income". Thus, if damages are allowed, certainly the substitution of "net margin" for "net income" would have the effect of making a new agreement for the parties.

Each of the defendant corporations is a nonprofit corporation, as is expressly provided in Article II of the Articles of Incorporation of Southwest Cooperative Wholesale and in the last paragraph of Article II of the Articles of Incorporation of United Producers and Consumers Cooperative. Accordingly, any margin collected by either corporation could not inure as a profit to that corporation. Even the "net income" of the United Producers and Consumers Cooperative, which was the profit obtained from non-member customers, was not retained by the company but was divided among the members. The evidence shows that the company pays income tax only on this "net income", and the only net income shown in the evidence was for the year 1952, and was in the sum of \$21,760.50.

It is true that there was no net income for Southwest Cooperative Wholesale, but the only percentage provided was on the "net income" of the two companies, and that item for the year shown was the aforesaid total amount of \$21,760.50. Two per cent of that amount is \$435.21, and that would be the only amount which Held could claim under the contract which he signed and which, according to the testimony of Pauline McInerney, he himself dictated, even if he was wrongfully discharged.

It is true that "net margin" had been discussed with Walmsley but Walmsley was not called upon to approve or execute the contract. (R 194). It does not seem that now Held could correctly contend we should use "net margin" merely because he discussed it previously any more than we could say the annual salary should be \$8,000 merely because it was previously discussed. (R 185). The defendants were not by law or otherwise precluded from dealing with non-members, that business could have been developed by Held. It appears to us that the plaintiff completely overlooks many of the cardinal rules of construction of contract when he insists the contract was valid but even goes further than normal reason when he asks the Court to change the wording of

the contract to suit his theory of damages, when the complaint does not ask for a reformation of the contract.

CONCLUSION

The judgment of the District Court should be vacated and reversed with direction to enter judgment for the defendant as prayed.

Respectfully submitted

SCOVILLE & LINTON

By Walter Linton
Attorneys for Appellants,
219 Heard Building
Phoenix, Arizona

No. 14,400

In the
United States Court of Appeals

For the Ninth Circuit

1954 TERM

UNITED PRODUCERS AND CONSUMERS CO-
OPERATIVE, a Corporation, and SOUTH-
WEST CO-OPERATIVE WHOLESALE, a Cor-
poration,

Appellants,

vs.

RALPH W. HELD,

Appellee.

Appellee's Reply Brief

Appeal from the United States District Court
for the District of Arizona

FILED

OCT 7 1954

JENNINGS, STROUSS, SALMON & TRASK

O. M. TRASK

619 Title & Trust Building
Phoenix, Arizona

Attorneys for Appellee

PAUL P. O'BRIEN
CLERK

TABLE OF CONTENTS

	Page
STATEMENT OF CASE.....	1
ARGUMENT	4
Part I. A Manager's Contract for a Three Year Term Is Not Prohibited by the By-Laws of the Defendant Corpo- rations	4
Part II. A Contract for Employment of a Manager for a Corporation for a Term Beyond the Terms of the Then Members of the Board Is Not Void or Unenforceable.....	13
Part III and IV. The Plaintiff Was Employed Pursuant to the Boards' Authority.....	16
Part V. Ratification	21
Part VI. Statute of Frauds.....	23
Part VII. Failure of Performance.....	23
Part VIII. Computation of Damages.....	26
Part IX. The Findings of the Trial Court Should Be Sustained	33
SUMMARY OF ARGUMENT.....	34
CONCLUSION	35

CITATIONS

CASES	Pages
Baltimore & O. R. Co. v. Foar, 84 F.2d 67 (7th Cir. 1936).....	22
Berkal v. M. De Matteo Const. Co., 327 Mass. 329, 98 N.E. 2d 617 (1950)	30
Black Star Coal Co. v. Napier, 303 Ky. 778, 199 S.W. 2d 449 (1947)	28, 31
Carr v. Yokohama Specie Bank, 200 F.2d 251 (9th Cir. 1952)..	33
Carter v. Phillips, 88 Okla. 202, 212 P. 747 (1923).....	26
Cuppy v. Stollwerek Bros., 216 N.Y. 591, 111 N.E. 249 (1916)..	8
Douglass v. Merchants Ins. Co., 118 N.Y. 484, 23 N.E. 806 (1890)	7
Ford Motor Co. v. Chas. A. Myers Mfg. Co., 64 F.2d 942 (6th Cir. 1933)	23
Hansen v. Columbia Breweries, Inc., 12 Wash. 2d 554, 122 P.2d 489 (1942)	12, 14
Hawaii Consol. Ry. v. Borthwick, 105 F.2d 286 (9th Cir. 1939)	26
Hill v. American Cooperative Assoc., 195 La. 590, 197 So. 241 (1940)	10
Hopkins v. Austin State Bank, 410 Ill. 67, 101 N.E. 2d 536 (1951)	26
Kuenzi v. Radloff, 253 Wise. 575, 34 N.W. 2d 798 (1948).....	30, 32
Lois Grunow Memorial Clinic v. Davis, 49 Ariz. 277, 66 P.2d 238 (1937)	20
Mead v. Seaboard Surety Co., 198 Minn. 476, 270 N.E. 563 (1936)	30
Nelson v. James Nelson & Sons, 2 KB 471 (1913).....	10
Nevada Half Moon Mining Co. v. Combined Metals R. Co., 176 F.2d 73 (10th Cir. 1949).....	30, 31
Oedekerck v. Muncie Gear Works, 179 F.2d 821 (7th Cir. 1950)	23
Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541 (9th Cir. 1949).....	29, 33

	Pages
Re: Paramount Publix Corporation, 90 F.2d 441 (2nd Cir. 1937)	8, 15
Realty Acceptance Corporation v. Montgomery, 51 F.2d 636 (3rd Cir. 1930).....	10, 15
Valley v. American Lubricator Co., 119 Iowa 591, 93 N.W. 590 (1903)	7
W. S. Kresge Co. v. Sears, 87 F.2d 135 (1st Cir. 1936).....	28
Trustees v. Shaffer, 63 Ill. 243.....	10
Wescon Federal Savings & Loan Ass'n. v. Aetna Inv. Corp., 74 Ariz. 163, 245 P.2d 423 (1952).....	13
Tyson v. Tyson, 61 Ariz. 329, 149 P.2d 674 (1944).....	29
Wayne v. New York Life Ins. Co., 132 F.2d 28 (8th Cir. 1943)..	20
Weathersby v. Texas & Ohio Lumber Co., 107 Tex. 474, 180 S.W. 735 (1915).....	22
Wisconsin Employment Rel. Bd. v. Gateway Glass Co., Inc., 265 Wis. 114, 60 N.W. 2d 768 (1953).....	30, 31
Wright v. Warren Bros. Co., 204 Fed. 231 (4th Cir. 1913).....	7

STATUTES

Arizona Code Annotated, 1939, Chapter 49, Article 7.....	2
Arizona Code Annotated, 1939, Section 49-701.....	2
Arizona Code Annotated, 1939, Section 49-713.....	11
Federal Rules of Civil Procedure, Section 8(e).....	23
Federal Rules of Civil Procedure, 52(a) 28 U.S.C.A.....	33
V. Va. Code Ann. 1923 C 53, Para. 53.....	12, 13
V. Va. Code Ann. 1932, Para. 3030.....	13

TREATISES

3 Am. Jur. Para. 983, p. 935.....	22
3 Am. Jur. Para. 890, p. 870.....	18
3 Am. Jur. Para. 982, p. 872.....	20
3 Am. Jur. Para. 1036.....	22
9 C.J.S. Para. 738(3), p. 72.....	8
Fletcher Cyclopedia Corporations (permanent edition) Para. 807, p. 59.....	22
Fletcher, Cyclopedia of Corporations (permanent edition) Volume 2 of 1954 Revised Volume.....	8
New York Stock Corp. Law, Sec. 60.....	8, 9

No. 14400

In the

United States Court of Appeals

For the Ninth Circuit

1954 TERM

UNITED PRODUCERS AND CONSUMERS CO-
OPERATIVE, a Corporation, and SOUTH-
WEST CO-OPERATIVE WHOLESALE, a Cor-
poration,

Appellants,

vs.

RALPH W. HELD,

Appellee.

Appellee's Reply Brief

Appeal from the United States District Court
for the District of Arizona

STATEMENT OF CASE

Although the two corporate defendants are separate non-profit corporations, they are, for operating purposes, almost identical. The Southwest Co-Operative Wholesale, is a corporation, the principal customer of which is the United Producers and Consumers Co-operative (TR 144). The United Producers and Consumers Co-Operative in turn sells to retail customers. The personnel operating the two are

the same; the location of their offices is the same; several of the incorporators of each are the same; and several of the officers and directors, including the president, are likewise the same. Both of them, however, were not, as stated in the Appellants' Brief, organized in accordance with Chapter 49, Article 7, Arizona Code Annotated, 1939, which is the Chapter entitled "Cooperative Marketing". The United was organized pursuant to this chapter and it is so stated in the preamble. The Southwest was not, and could not be, because it is a stock corporation, which a cooperative marketing corporation may not be under the Arizona Code (Section 49-701, Arizona Code Annotated, 1939). The Southwest was organized under the general incorporation laws.

In December, 1951, the two corporations were badly in need of a General Manager. At that time one of the directors wrote a letter to Ralph Held, the plaintiff, in Des Moines, Iowa, where he was a co-op executive, seeking to find a manager (TR 58). In January, 1952, the same director arranged a meeting in Chicago between Plaintiff and Mr. Walter Smith, President of both corporations, and Mr. Lewis Walmsley, auditor for both corporations (TR 59). The Defendants' representatives were sufficiently impressed with the Plaintiff that as a result of the meeting Mr. Smith offered to pay the expenses of the plaintiff if he would go to Phoenix and look the situation over. The plaintiff did so and spent two days in Phoenix being entertained by members of the defendants' organizations and consulting, advising and inspecting (TR 62-64). Plaintiff at that time told Mr. Smith he was not interested in any offer to become manager (TR 65). Later in February, 1952, Mr. Smith telephoned the plaintiff in Des Moines and again importuned him to go to Phoenix. At that time the plaintiff told Mr. Smith he was practically committed to accept a

position in St. Louis, but Smith insisted and again offered to pay plaintiff's expenses to go to Phoenix and take a second look at defendants' proposition (TR 66). Plaintiff finally agreed to do so and again spent a couple of days in Phoenix. He was met by Mr. Smith and taken to a luncheon attended by a number of the directors. Later that afternoon he attended a formal meeting of the combined boards of directors of both corporations and interviewed them and was interviewed. At that time he told the directors that he would not consider employment for less than a three year term (TR 68). Following the interview plaintiff was excused and the boards considered the matter. Mr. Smith, the President, then came out and told plaintiff the boards had given him authority to employ the plaintiff (TR 69). Smith arranged a dinner engagement for plaintiff with Mr. Walmsley, the auditor, on the same evening, during which the employment terms were further discussed. The following afternoon a written contract was dictated by plaintiff and Smith together and prepared in triplicate (TR 72; 108). Smith signed two copies and gave them to plaintiff who stated he would consider this offer and the St. Louis offer further and let Mr. Smith know his decision. On March 20, 1952, Smith again telephoned the plaintiff in Des Moines to learn what the plaintiff's decision had been and at that time the plaintiff told Smith he would accept, and would place the signed contract in the mail (TR 74). He did so and the contract was received. President Smith died suddenly on March 25, 1952 and the plaintiff went to Phoenix and assumed management of both corporations on April 1, 1952. He devoted all of his time to the business of the two corporations and attended all of the meetings of the boards of directors, of which there were three or four, prior to the time the present difficulty arose.

On May 27, 1952, while the plaintiff was in Des Moines to bring his family to Phoenix after having sold his house there, he received a telegram from D. O. Essley, the new president, questioning the legality of his contract. This was the first suggestion he had received that anything was wrong. He returned to Phoenix to confer with the boards and later learned that the claimed illegality was that the boards' resolution authorizing his employment had stated the boards had authorized Smith and Walmsley to work out the terms of his employment and Walmsley had stated he had not been consulted by Smith. No notice was ever given the plaintiff that such was the tenor of the resolution or that Smith did not have complete authority (TR 352). The plaintiff's contract was formally terminated on June 20, 1952, and he was so notified. This action ensued.

ARGUMENT

I.

A Manager's Contract for a Three Year Term Is Not Prohibited by the By-Laws of the Defendant Corporations.

It is to be noted that the By-Laws of neither corporation say that the Board is "prohibited" from employing a manager for a definite term even though Appellants' First Proposition of Law is thus stated. The By-Laws of both corporations do state that the board of directors shall have power to appoint a manager, "who shall hold office at the pleasure of and upon terms and conditions fixed by the Board." The By-laws of United, however, also contain a provision which refers to both appointive and elected offices and states:

"Article VIII, Sec. 3. The compensation and *tenure of office* of all offices shall be fixed by the Board of Directors."

It is therefore concluded by Appellants that the provision for holding office "at the pleasure" of the board gives the board the power to arbitrarily discharge a manager employed by a written contract for a term of three years. Let us examine the argument in the light of the facts as they are shown to have existed. When Mr. Held met with the directors of the two corporations on March 6, 1952 he had gone to Phoenix at their express invitation and expense to consider the managership. It was the second trip he had made at the defendant corporations' invitation and expense, the offer to negotiate having been turned down by plaintiff on the first occasion. The President of both corporations had personally negotiated with him on several previous occasions and this instance. Several members of the boards had met with him and talked with him on the very day of the formal meeting. They knew he was there for the purpose of discussing an employment contract. The members of the boards knew that their By-Laws provided that they had the power to employ a manager "at their pleasure." Mr. Held, the prospective manager, said to them at that meeting (TR 68):

"Q. What discussion did you have at that meeting with the members of the Board? Did they make any inquiries of you, and tell the Court what those were?

A. Yes, they invited me into the meeting and asked me to relate my business experience which I had, which covered the period of management of the two co-operatives back in Iowa which I had previously managed and I think I went back to the time that I graduated from Iowa State College and spent 4 years as a county agricultural agent in one of the northwest Iowa counties and then spent 4 years as a farm loan representative for the farm loan division of the Aetna Life Insurance Company, after which I spent all of my time in co-operative management.

I believe I also told them that while I was here interested in their proposition that I was tentatively committed, at least I felt that I was, on a job in St. Louis with a corporation with which I had been familiar for some time, and that they were offering me a job at \$10,000 per year and that under the circumstances I couldn't consider coming out here for less than a 3 year term.

Q. Did any of the members of the Board of (20) Directors make any objection to your statement that you wouldn't consider coming out here for anything less than a 3-year term?

A. Not that I was aware of.

Q. Did any of them say anything at that time?

A. No, sir."

The members of the Board thereupon retired to executive session and authorized the negotiation of a contract of employment after discussion of a three year term with no objections having been made, and such a contract was actually executed (TR 146). Can it not fairly be said that the three year term did in fact represent their pleasure? It is, of course, true that had the plaintiff accepted employment without a definite term he would have been subject to arbitrary discharge "at their pleasure", but when the period of employment was discussed in advance and a formal contract was thereafter executed in accordance with that discussion and the plaintiff worked under it with the knowledge and acquiescence of the boards, it would appear basic honesty would require its legal approval unless overpowering reasons compelled its rejection.

Upon authority, appellants have cited cases from several jurisdictions apparently sustaining the right to discharge an officer notwithstanding a definite term. The cases cited at pages 17-18 of Appellants' Brief are principally from

ew Jersey, West Virginia and Washington. In each of those cases the deciding factor was a state statute. Arizona has no similar statute as Appellants concede on page 24 of their brief. The Federal case cited (*Wright v. Warren Bros. Co.*, 204 Fed. 231) was one which arose in West Virginia and was likewise based upon a West Virginia statute. The Iowa case cited on page 18 (*Selley v. American Lubricator Co.*, 119 Iowa 591, 93 NW 590) was a case of discharge for cause and thus not in point. The New York case (*Douglass Merchants Ins. Co.*, 118 N.Y. 484, 23 NE 806) was one where the plaintiff had been an employee of a corporation for some 28 years and there was *no* special contract as to term of service. The court stated that the "at the pleasure" provision of the By-Laws constituted a "reserved right of termination" at the time the plaintiff was employed. The court further indicated that where there was a special contract of employment the case might be different. The Court approved an earlier Superior Court case holding to the contra and establishing liability of the corporation where there was a special contract and stated at page 807:

"It may be assumed, for the purposes of the question, that this is within the power of the board, which creates the by-laws, and that when it appears that a special contract is made by such board, in terms which indicate an intent of the parties to exclude from it the operation of the by-laws having relation to the right of terminating service, such contract of employment may not be subject to it."

The court thereafter continued and stated at page 807:

"But here was no special contract which indicated any purpose to abridge the right of removal at pleasure given by the by-law, which entered into the contract of employment, and subject to which the plaintiff went into, and continued in, the defendant's service until this reserved power was exercised."

It is respectfully submitted that the cases relied upon by Appellants do not represent the best of the law either upon principle or upon authority. In Fletcher, Cyclopedia of Corporations (Permanent Edition) Volume 2 of the 1954 Revised Volume, the author discusses this problem and concludes :

“* * * on the other hand, the trend of recent authority seems to be in favor of recognizing liability on the part of the corporation.” (Para. 355, page 158.)

In 19 C.J.S. Par. 738 (3) page 72, it is stated :

“An agent employed under a contract fixing no stated term of employment may be removed even in the absence of any by-law so providing; but a corporation cannot, without cause, discharge or remove an agent in violation of a contract under which he is employed for a definite period without becoming liable for damages, *despite a statute or by-law permitting the removal of agents at the pleasure of the board.* * * *” (Emphasis added.)

Later New York cases have held that despite a by-law and even in the face of a state statute, which gives the directors the power to remove an officer, agent or employee “at pleasure” (Sec. 60, N. Y. Stock Corp. Law) this right of removal is subject to liability for damages if wrongfully exercised where there is a special contract.

See: *Cuppy v. Stollwerck Bros.*, 216 N. Y. 591, 111 NE 249 (1916);

In Re: Paramount Publix Corporation, 90 Fed. 2d 441-444 (2nd Cir. 1937).

In the latter case, which was an appeal from the District Court of the United States for the Southern District of New York, the question was one of the validity of an employ-

ment contract for three years in view of the New York statute, providing in part:

“The Directors may require any such officer, agent or employee to give security for the faithful performance of his duties, and may remove him at pleasure.” (Sec. 60, N. Y. Stock Corp. Law.)

Judge Swan pointed out that the District Court had held that a corporation is liable in damages for discharging an employee without cause prior to the termination of his contract even under this statute and concluded (Page 433):

“The consequences of accepting the opposite view are startling. It would mean that no New York stock corporation could make a binding contract of employment for a definite term; all officers, agents and employees would be dischargeable at will without liability on the part of the corporation, and it would follow that any of them could leave at will without incurring liability on their part, no matter how essential their services might be to the interests of the corporation. The announcement of such a doctrine would certainly cause surprise and consternation to the business world, for the statute has stood on the books since 1890 without any court decision to that effect and it is common knowledge that many contracts of term employment have been made by New York corporations on the assumption of their validity.”

Judge Swan then analyzed the New York cases and also considered the cases from West Virginia and Washington and stated (Page 445):

“There would seem to be no more reason to hold that section 60 was intended to relieve the corporation from the obligation to pay damages for breach of contract than to construe in that way a by-law empowering the directors to remove an officer at pleasure. Such a by-law came before the Court of Appeals in *Cuppy v.*

Stollwerck Bros., 216 N. Y. 591, at page 597, 111 N.E. 249, 250, where the court said:

“The power to remove him from the office to which he had been elected did not carry with it the right to discharge him from the employment of the defendant in view of the special contract for a fixed term under which he was employed’ ”.

Appellee respectfully submits that the decision of this distinguished court is entirely sound.

Cases which have held that a corporation is liable for wrongful discharge despite a provision in their by-laws similar to those under consideration here are as follows:

Realty Acceptance Corporation v. Montgomery, 51 Fed. 2d 636, 639 (3rd Cir. 1930);

Hill v. American Cooperative Assoc., 195 La. 590; 197 So. 241 (1940);

Nelson v. James Nelson & Sons, 2 KB 471 (1913);

Trustees v. Shaffer, 63 Ill. 243.

In the latter cases the courts have pointed out that by-laws are nothing more than rules of conduct adopted by the directors or the members themselves for the efficient handling of the business affairs of the corporation and are subject to amendment. Where the board either directly or through its duly authorized agent enters into a contract for a definite term it cannot escape responsibility for this contract and repudiate it by taking refuge behind a by-law which the corporation could have amended or modified.

The by-laws of both of the defendant corporations are subject to amendment.

The by-laws of United Producers and Consumers Co-Operative are as follows:

“Article XIV. * * * The By-laws may be amended, altered or repealed by the Board of Directors at any regular or special meeting.”

The By-laws of Southwest Co-Operative Wholesale are as follows :

“Article VIII. Amendments. These by-laws may be amended by the majority vote of the directors of the corporation at any meeting called for that purpose except as limited in the Articles of Incorporation or by law.”

Appellants argue there is some statutory restriction on the right to amend because of the provision of the Co-Operative Marketing Act of the State of Arizona. This is incorrect. In the first place the Southwest was not organized pursuant to that act and cannot qualify under it because it is a stock corporation. Its power to amend is limited only by its own by-laws. Secondly, there is no evidence of any limitation upon the power of United Producers and Consumers Co-Operative by way of restriction to amendments to “contract period” as contended on page 21 of Appellants’ brief. At that page in their brief Appellants stated that the by-laws of United can only be revised or renewed at the end of each contract period and the contract period was one year from March 1, 1952. This statement refers to a provision of the Act which provides that :

“The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten [10] years, all or any specified part of their agricultural products, or specified commodities, exclusively to or through the association or its facilities; * * *” (Section 49-713, Arizona Code Annotated, 1939)

This is a *marketing contract* wherein the members for a term agree to sell certain or all of their products to the co-operative during the contract period. The provision that the by-laws cannot be revised or renewed except at the end

of the contract period was undoubtedly to protect the members against a change in price or terms during that interval. There is absolutely no evidence United had any such contract with any of its members. The statute is permissive only. The contract referred to at page 191-192 of the Record which is relied upon by Appellants is an entirely different matter. That was simply a resolution and not a contract, passed at the instance of the auditor at the beginning of each year, which provides that the net savings for the year should be credited to the patrons. It was a tax saving device and not a marketing contract with members to sell their products to the company. It imposed no limitation on the right to amend. There was, therefore, no limitation upon the power to amend the by-laws by United and the Assistant Secretary testified that they were *in fact amended* from time to time in regular meetings (RT 329). Moreover, the by-laws of United did not require amendment because they expressly provided that the compensation and *tenure of office* of all offices should be fixed by the Board of Directors (Art. VIII, Sec. 3).

It should be noted apropos of the Washington cases relied upon by Appellants which are based upon a statute, that the Legislature thought so little of the public policy permitting a corporation to enter into a contract for a term and then repudiate it without responsibility that it amended the law and made a corporation responsible for such breach of contract.

See: *Hansen v. Columbia Breweries, Inc.*, 12 Wash. 2d 554, 122 P.2d 489 (1942).

Similarly, the clause in the West Virginia statute which provided that "officers and agents shall hold their places during the pleasure of the board" (W. Va. Code Ann. 1923

C53, Para. 53) which was the basis for the cases from that state relied upon by Appellants, was *deleted* in the revision of 1931 (W. Va. Code Ann. 1932, Para. 3030) and has been omitted in all subsequent revisions.

The Model Business Corporation Act prepared by the National Conference of Commissioners on Uniform State Laws and enacted by several state legislatures is in accord in providing that corporations should have the power to remove but shall be liable in damages for wrongful removal (Sec. 32, Par. IV).

II.

A Contract for Employment of a Manager for a Corporation for a Term Beyond the Terms of the Then Members of the Board Is Not Void or Unenforceable.

This proposition of law has never been passed upon by the courts of Arizona. Appellants cite the Arizona case of *Tucson Federal Savings & Loan Ass'n v. Aetna Inv. Corp.*, 74 Ariz. 163, 245 P.2d 423 (1952), as authority for their position that such a contract is void. That case was one where the legality of a 10 year contract by one corporation to sell insurance to another corporation was in question. The Savings and Loan Association in its attempt to avoid the contract, cited certain employment cases as its authority. The Supreme Court of Arizona properly pointed out those cases were not in point and stated at page 170 of the Official Reporter:

“These cases limit the application of the rule to employment contracts, which we believe is sound.”

The Court held the contract in fact to be a binding contract and allowed damages for failure of all parties to perform it. The issue of the validity of an employment contract was not even before the Court. The statement quoted would

seem to say that employment cases are not in point on the issue before the Arizona Court. In fact, the employment cases cited by the Arizona Court were Texas cases dependent upon statute, a Wisconsin case involving a contract for life and a Louisiana case involving a secret contract between a President and a third party without the knowledge of the board of directors. The issue before the court here was never presented to the Arizona Courts, and has not been passed upon.

Appellants rely upon two cases from Texas and Washington as supporting their view that a contract for a term beyond the term of the board is against public policy as limiting future action. Appellants were forced to concede, however, those cases were dependant upon statute and no such statute existed in Arizona (R. p. 24). Moreover, the Washington cases have been over-ruled by the later case of *Hansen v. Columbia Breweries, Inc.* supra, wherein the Supreme Court of Washington said positively:

“* * * After entering into contracts of employment for a fixed period of time, corporations must be held liable in damages for the violation of such contract.

“The argument that the employment of agents or employees for a term of years deprives succeeding trustees of the power of removal and perpetuates a business policy is not persuasive. We are unable to see that the construction of the statute in a manner that permits the board of trustees to bind a corporation for a fixed term by employing individuals for a definite time handicaps the succeeding board any more than does the admitted power to bind the corporation by long term leases or other kinds of contracts extending over a long period of years.”

The language quoted above appears to have been taken from an almost identical statement made by the Circuit

Court for the Second Circuit in the *In Re: Paramount Public Corp.* case, supra. As a practical matter it may well happen frequently that it is impossible for a corporation to hire a man of ability unless it does have the power to bind itself for a definite term. The public policy therefore should seem to be favorable to the legality of such a contract and not unfavorable. Moreover, in this case the terms of the members of the boards were in fact for three years each, although a portion was elected each year and their terms thus staggered. The evidence also showed although they were elected, their election and re-election was a matter of course. Practically all of the members had served successive terms from date of incorporation to either their death or retirement (RT 142-143).

The cases which Appellee has cited hold that in the absence of a state statute (and Arizona has none) there is no public policy prohibiting the execution of a contract of employment by the board of directors beyond the term of office of the existing board. As stated by the Court for the Third Circuit in considering the five year employment contract involved there (p. 639):

“Nor was the contract one against public policy. It was not tainted with fraud. The restraint thereby placed upon the future freedom of action of defendant’s board of directors cannot be said to have been in fact or principle injurious to the public interest. The term of office therein fixed was neither permanent, unlimited nor for life, but, in view of plaintiff’s relation to defendant and his familiarity and grasp of its business, was for a reasonable period only. The contract was in conflict with no statute. * * *” (*Realty Acceptance Corp. v. Montgomery*, 51 F2 636, 639.)

III and IV.

The Plaintiff Was Employed Pursuant to the Boards' Authority.

The Third and Fourth propositions of law advanced by Appellants concern the agency questions which have been raised. In those propositions Appellants challenge the authority of President Smith to bind the corporations on the contract. In answer, Appellee will combine his argument under one heading since the issue is a single one, namely, the liability of the two corporations for the contract executed by Smith.

The Appellants, in their Third proposition, contend that because the uncommunicated and private resolution of the corporations authorized both Smith and Walmsley to "employ Mr. Held as general manager and work out the terms of his employment", a contract signed by Smith alone is invalid. It should be noted that the resolution does not require both men to sign the contract and unless Held had been expressly notified he would not expect, in the ordinary course of affairs, that an employment contract for a manager for a three year period would require the signature of an auditor.

There is not one iota of testimony that Held, prior to or at the time he began work, was notified of the resolution (TR 99). He testified that he did not know and that he had not the slightest inkling that Smith did not have complete authority to sign the contract (TR 352). Even if Held had been present at a later meeting of the boards and had heard the resolution read, there was nothing to indicate to him that Walmsley had not conferred with Smith and approved the contract as the resolution provided. He had ample opportunity to do so. The contract was signed by Smith on March 7, 1952. Held did not sign and return his copy until March 20, 1952. He did not report for work until April 1, 1952. In the meantime, both the resolution and the contract were a

part of the official files of the corporations and accessible to Walmsley and any other member of the boards (TR 153).

The suggestion in Appellants' brief that Held was in any way over-reaching in his negotiations or attempting to force an agreement for a contract, is entirely contrary to the actual evidence in the record. He had not solicited this employment. Smith and the other directors had solicited him and had kept after him even after he had, upon the first occasion, notified the corporations that he was not interested. At the time he had a good position in Des Moines, Iowa, and had been offered a better position in St. Louis. He had not the slightest reason to avoid Walmsley and as a matter of fact the testimony shows that he did not. On the very day that the resolution was adopted authorizing Held's employment, Mr. Smith, the president, requested Walmsley to take Mr. Held to dinner at the Arizona Club (TR 170). At this meeting the terms of the employment were discussed with Walmsley (TR 170) and Walmsley indicated no objection to any of the terms which had theretofore been discussed. From Held's point of view he had every reason to believe that both Walmsley and Smith were co-operating completely in the negotiations, even though there was no reason for him to believe that Walmsley's signature was required on the document.

Nor is there anything in the resolution itself that in fact requires Walmsley's signature on the document. From Held's standpoint so far as can be told from the record, both Smith and Walmsley did "work out the terms of his employment."

There is substantial evidence, moreover, from which the court could have found and did find that Smith and Smith alone was the one whom the boards of directors empowered to make the final decision on the contract, and that Walmsley was authorized only for the purpose of advising and

assisting Smith. Orval Knox, who was an officer and director of one of the companies and who was present at the meeting when the resolution was adopted, so testified (TR 148). The trial court has found as a fact upon this and the other evidence that the approval of Walmsley was not required to authorize or validate the contract (TR 30, Finding of Fact V).

Not only was there actual authority, but, it is submitted there could not be a more clear cut case of apparent authority of Smith to negotiate and execute the contract. The President is the one who normally would execute such a contract and negotiate it. The Boards of directors were entirely aware at all times that Smith was in the course of negotiating the contract. They held him out to the plaintiff as having that authority. Not only did they fail to notify Held that there were secret limitations upon the authority of Smith, but they did not even notify their own employee that he was expected to have a part in the negotiations. The general rule with respect to apparent authority is set out in 13 American Jurisprudence, Para. 890, at page 870, as follows:

“It is a fundamental and well-settled rule that when, in the usual course of the business of a corporation an officer or other agent is held out by the corporation or has been permitted to act for it or manage its affairs in such a way as to justify third persons who deal with him in inferring or assuming that he is doing an act or making a contract within the scope of his authority, the corporation is bound thereby, even though such officer or agent has not the actual authority from the corporation to do such an act or make such a contract. This authority is known as apparent or ostensible authority. This apparent authority is materially the same and is based upon the same principles as authority by estoppel. Stating the rule in terms of estoppel,

a corporation which, by its voluntary act, places an officer or agent in such a position or situation that persons of ordinary prudence, conversant with business usages and the nature of the particular business, are justified in assuming that he has authority to perform the act in question and deal with him upon that assumption is estopped as against such persons from denying the officer's or agent's authority."

It is supported by a multitude of cases and is the rule adopted by the American Law Institute in its Restatement on Agency.

But, argue the Appellants, they also desired Walmsley to participate and now assert that where the agency is conferred on two or more persons they must act accordingly. Even if conceded that the general rule is as asserted, nevertheless insofar as Held is concerned, it would appear they did in fact act jointly. Walmsley testified that he did not know anything about this authority that was conferred upon him. However, Mr. Collier, one of the directors, testified *he told Walmsley about it on/about March 7, 1952*, the date the authority was conferred (TR 219).

Pauline McInerney, the Assistant Secretary, also knew about it because she typed out the resolution (TR 329). But not a one of the defendants' directors or officers or agents testified that any of them had notified Held. Under such circumstances Held surely could not be bound by whatever secret limitations the directors saw fit to place upon the authority if there were in fact such limitations made. It is submitted that neither the facts nor the law sustain Appellants' argument on this proposition.

"As to third persons dealing in good faith with an officer or an agent of a corporation and relying upon his apparent authority, such authority is tantamount to the actual authority of the agent. Secret instructions

or limitations upon the apparent general authority of an officer or agent of a corporation will not affect one who deals with him in the general line of his authority, who knows nothing of such limitations. This is an exception to the rule that one dealing with the officer or agent of a corporation is bound to ascertain the extent of his authority. * * *” (13 Am. Jur. Para. 982, p. 872.)

See also: *Wayne v. New York Life Ins. Co.*, 132 F.2d 28 (8th Cir. 1943).

In the *Wayne* case, supra, Judge Gardiner said at page 33:

“* * * Where a principal clothes its agent with apparent authority to act in certain capacity, it is bound by all the acts of such agent within the scope of such authority. Third persons dealing with an agent possessing such authority are not bound by secret limitations on such apparent authority.”

Appellee does not question the authority of the Arizona cases cited under proposition IV to the effect that a person dealing with an agent has a duty to ascertain the agent's authority. They are entirely sound as applied to their own facts. But the Arizona court recognizes that as a counterpart of the third person's duty to use reasonable care to ascertain the agent's authority, the principal has likewise some responsibility where it holds out its officer or agent to that third party as being its authorized representative. And if the third party has acted reasonably under the circumstances in assuming the agent to have had the authority which he purported to have, the principal is bound. Said the Arizona court in the case of *Lois Grunow Memorial Clinic v. Davis*, 49 Ariz. 277, 66 P.2d 238, at page 242:

“The authority of an agent may be either direct or implied. Direct authority exists only when the principal

has definitely and specifically authorized the agent to perform the act in question, but when the rights of third persons are concerned, the law sometimes implies the authority of the agent, although no direct authority has been given the latter, and in some circumstances even though the authority has been expressly refused by the principal. The test in cases where implied authority is relied upon is whether, *under all the circumstances of the particular case*, the party relying on such authority acted as a reasonable and prudent man who knows that he is dealing with an agent, in ascertaining the extent of the authority of that agent. * * *” (Emphasis by the Court.)

In this case the court, after hearing the evidence, was of the view, and properly so, that Held was abundantly justified in assuming that President Smith had the authority he purported to exercise.

V.

Ratification

Appellants contend there could be no ratification of this employment contract because the directors had no knowledge of it. Yet the directors had sat in a special formal meeting on March 6, 1952 and authorized the employment of Held as manager. On April 3, 1952, Held attended a meeting as manager and assumed his duties. He was there for almost three months and attended three or four directors' meetings. It is somewhat of a strain on one's credulity to believe that the directors did not have some idea that Held was employed and there was a contract of employment. Smith, the President of both, and a director of both, knew about the contract prior to his death. Orval Knox, an officer and director of Southwest knew about it. Pauline McInerney, Assistant Secretary, drew up the contract, saw Smith sign it and opened

up the letter containing the contract when it was sent back by Held. It is reasonable to believe that others of the directors knew about it also.

“It is not necessary in order to show knowledge of a corporation to show knowledge by its Board of Directors; it is sufficient to show knowledge by any officer or agent obtained while performing business for the corporation within the scope of his authority.” (3 Fletcher Cyclopedia Corporations (permanent edition) Para. 807, p. 59.)

See also: *13 Am. Jur. 1036*;

Weathersby v. Texas & Ohio Lumber Co., 107 Tex. 474, 180 SW 735 (1915).

A corporation may ratify an act simply by failure to repudiate it after knowledge, whether actual or implied.

See: *13 Am. Jur. Para. 983, p. 935*;

Baltimore & O. R. Co. v. Foar, 84 F.2d 67 (7th Cir. 1936).

In the latter case the court said at page 71:

“A board of directors is not only bound by what it actually knows, but it may be bound by what it ought to have known, or by proper attention to its business would have known. In *Knights of Pythias v. Kalinski*, 163 U.S. 289, 16 S.Ct. 1047, 1051, 41 L.Ed. 163, the Court said, ‘If the company ought to have known of the facts, or, with proper attention to its own business, would have been apprised of them, it has no right to set up its ignorance as an excuse.’”

Appellee has not urged ratification because he believes there can be no doubt but what the contract was properly authorized and executed. However, there would seem to be little doubt too, that if ratification can occur, it did occur here.

VI.

Statute of Frauds

For the first time the Appellants urge the Statute of Frauds on their appeal. It was not pleaded. It was not urged or even suggested in the trial court. It is respectfully submitted that even if the issue had merit it could not now be urged. The statute is an affirmative defense which may be waived and must be pleaded under *Section 8 (c) Federal Rules of Civil Procedure*. If not, it is lost.

See: *Ford Motor Co. v. Chas. A. Myers Mfg. Co.*, 64 F.2d 942 (6th Cir. 1933);

Oedekerck v. Muncie Gear Works, 179 F.2d 821 (7th Cir.).

The defense of the statute assumes the contract was not signed by anyone "lawfully authorized." The Trial Court found to the contra.

VII.

Failure of Performance

The attempt of the Appellants to justify the discharge of Appellee upon the facts presented in this law suit is about as weak as such an attempt could be.

There was not a single act of malfeasance charged against the plaintiff. He was never criticized by anyone as to the manner in which he handled his job until he received notice his contract "was illegal". The business showed an increase while he was there. The several directors testified that when they were in the offices of the companies they did not see him. They did not charge he was not on company business, but simply they did not see him and they were accustomed to seeing the former manager always at his desk. Several employees were brought in to testify that Held did not go to talk to them very often in their departments, but admitted

their departments were running smoothly and there was no particular need for him to do so (TR 250; 254). It would appear that they expected Held to be everything, for everybody, all the time.

The directors admitted he was never given any particular instructions in learning the manner of the operation of the business and was never told whether he was expected to spend all his time in the office or out of the office nor was any routine established or recommended. A good example of the character of criticism leveled at Held appeared in the testimony of D. O. Essley, the President who succeeded Mr. Smith. He testified Held was not the man they wanted—"nothing personal against him" (TR 205) but he wasn't in his office very much of the time. He was then asked (TR 207):

"Q. I will ask you to state about how many times you tried to find Mr. Held there at the place of business or the plant and were unable to?

A. Oh, maybe once or twice."

And for that they chose to terminate his contract!

The testimony of the field men, i.e., Herbert Holmes (TR 295-304), John Kleinz (TR 311-313) and Lehi Palmer (TR 305-309) would indicate that Held not only took a keen interest in the problems of the companies, but was willing to work on Saturdays and in the evenings, although the companies' offices were not ordinarily open on Saturday (TR 229). Although all of these witnesses were defendants' witnesses they had no complaint or criticism to offer against Mr. Held.

Pauline McInerney testified that he did not appear to be interested in the financial reports and data, and yet James Leonard, who is a CPA and was office manager, testified that he furnished financial reports and data to Held and

that Held did take an interest in the financial progress of the companies (TR 338-340). It is not without significance to point out that on one occasion when Mr. Leonard was making out a report for Held at Held's request, Mrs. McInerney inquired what he was doing and when told, she told Mr. Leonard that it was not necessary to make the report (TR 340). It would appear that Mrs. McInerney, who had been there for some 15 years was not happy at the choice of a manager from the outside.

Several witnesses testified that Held conducted staff meetings which were held at his direction and at which each department head was given the opportunity to make any suggestions he desired to make (TR 341, 250, 277). Held testified that he made it a point to visit each of the directors at his farm and get acquainted and discuss the problems of the business. The directors did not deny this. He made trips to some of the concerns with which the companies were doing business to find out if business could be increased. He learned from one director that the lubricating oil sold by the company was not being used by the director in his heavy machinery because he was afraid of its quality. Held promptly had a sample analyzed in Chicago to determine the difficulty. He attended field demonstrations of equipment being sold by the company; he went with salesmen to help work out customer relations problems; he prepared a new advertising campaign resulting in the unloading of an over-stocked inventory of tires; in short, he apparently did everything that one would ordinarily expect that a capable and experienced manager would do.

The court found that the Plaintiff and Appellee at all times complied with the terms of his contract and that the action of the corporation in terminating his employment

was wrongful and without justification (Finding of Fact VI and VII TR 30).

VIII.

Computation of Damages

The last resort of the Appellants to defeat the right of Appellee to the benefits of the contract is to contend that the term "net income" means only "net taxable income" or "net income for tax purposes" and since there was only a trifling amount of such income in one corporation and none at all in another, this contracting party can recover only \$435.21.

"Net income" according to the ordinary meaning of the term is the gross income after costs and expenses have been deducted,

"remaining after the deduction of all charges, outlay, loss, etc.; as net profit; net proceeds; net income" (Webster's New International Dictionary, Second Edition Unabridged)

"Net income" is not a word of art or phrase capable of exact or inexorable definition. With respect to depletion allowances it may mean one thing

See: *Carter v. Phillips*, 88 Okla. 202, 212 P. 747 (1923)

with respect to Federal income taxation, another; and with respect to trust accounting still another,

See: *Hopkins v. Austin State Bank*, 410 Ill. 67, 101 NE 2 536 (1951).

As this Court said in *Hawaii Consol. Ry. v. Borthwick*, 105 F2 286-288 (9th Cir. 1939)

" 'Net income' is an elusive term, and often remains so despite elaborate attempts to define it."

As the court further stated in the same opinion it is ordinarily the amount remaining after deducting from the taxpayers gross income, the aggregate of all costs and expenses.

Now the Appellants would urge that after net income is computed according to the ordinary meaning of the term, the defendants' corporations can, by designating practically all of it as "net margin" practically eliminate net income altogether and thus eliminate their liability for damages. The reason the defendants designate what would ordinarily be "net income" as "net margin" is that what is left over as profit is returned to the co-op members as dividends. The only portion they designate as net income for their own corporate procedure is a nominal sum received from sales to non-members.

Actually, there is no dispute about what both parties intended. The plaintiff, Held, testified that in discussing the figures with Walmsley they were negotiating on the basis of 2% of a figure of approximately \$400,000.00 per year which was the net income or net savings of the corporations (TR 97). He further testified that net savings and net income are used interchangeably in cooperative terminology (TR 97). Likewise, Walmsley admitted that it was this same figure which he had in mind and had actually discussed with Held as the basis for the percentage compensation (TR 171; 186). Nowhere in the record is there a single word of evidence or even a suggestion that the parties contemplated the percentage figure to be applied to the taxable income. Walmsley also testified that this figure of approximately \$400,000.00 was the figure which in ordinary corporate practice and parlance would be "net income" (TR 173-174).

"Q. That figure [\$4,387.20] plus \$389,000—odd figure that you have just testified to would represent the

net earnings or net income or net savings for the two corporations for that period, would they not?

A. Yes, they would."

In view of the fact that Walmsley was the auditor and financial expert upon whom the directors were now supposed to be relying in order to negotiate and advise on contract terms and arrangements, it is a little surprising to learn that he is ignored for the purposes of this argument. The net income figure for tax purposes (TR 192) was so trifling in comparison with other business done that it was never considered as a factor in contract negotiations and there is no dispute in the evidence on this point. It was never mentioned by either party and considerable doubt exists as to whether Held ever had any idea that such a computation existed on the books of the two corporations.

It is well established that in considering the terms and meaning of a contract the common or usual meaning should be ascribed to the terms.

Black Star Coal Co. v. Napier, 303 Ky. 778, 199 SW2d 449 (1947);

S. S. Kresge Co. v. Sears, 87 F.2d 135, 138 (1st Cir. 1936).

In corporate management "net income" is synonymous with "net earnings" or "net profits" and means the gross proceeds of sales less the cost of merchandise and cost of sales. Walmsley frankly admitted this. In co-operative terminology those terms are used inter-changeably with "net savings" and "net margin". Orval Knox, one of the defendants' officers and directors stated that the directors were discussing the proposed compensation on the basis of authorizing Mr. Smith to negotiate with Held for a salary of \$10,000.00 plus "up to 5% of the net". (TR 146). D. O.

Essley indicated the same (TR 204-205). It is apparent they were computing the net in the ordinary significance of the term.

The primary and fundamental rule of construction in interpreting contracts is to determine what was the intention of the parties and that intention should control.

See: *Tyson v. Tyson*, 61 Ariz. 329, 149 P.2d 674 (1944);

Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541 (9th Cir. 1949).

The Arizona case in discussing contracts between husband and wife which the court had for interpretation referred to the rule of the restatement of the law of contracts and stated at page 678:

“Restatement of the Law, Contracts, Sec. 236:

“(a) An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect.”

In the *Pacific Portland Cement Co.* case, *supra*, this Court stated at page 552:

“It is the aim of courts, in interpreting a written contract, to give effect to the mutual intention of the parties as it existed at the time of the execution of the contract. This is a primary rule of construction, generally recognized and embedded in California law (citing cases)

“In applying this norm, the courts will interpret words in the sense in which they are ordinarily used, except when they are used in a special or technical sense (citing cases)

“The principle has been summed up very succinctly by Judge Learned Hand in *New York Trust Co. v. Island Oil & Transport Corp.*, 2 Cir., 34 F.2d 655, 656:

“‘It is quite true that contracts depend upon the meaning which the law imputes to the utterances, not upon what the parties actually intended; but, in ascertaining what meaning to impute, the circumstances in which the words are used is always relevant and usually indispensable. The standard is what a normally constituted person would have understood them to mean, when used in their actual setting.’

“In seeking light on the meaning of words used in a contract, prior negotiations and surrounding circumstances may be considered * * *”

Here the intention has been established without contradiction and the Court has rendered its judgment in accordance with that established intent.

In order to adopt the construction the Appellants have urged it would be necessary not only to disregard the uncontradicted intent of *both* parties, but it also becomes necessary to adopt a construction which would be unreasonable and unjust. Such an interpretation does not become the law and is not established by precedent. On the contrary, a construction is to be avoided which would lead to absurd or unjust results.

See: *Berkal v. M. De Matteo Const. Co.*, 327 Mass. 329, 98 N.E.2d 617 (1950);

Mead v. Seaboard Surety Co., 198 Minn. 476, 270 N.W. 563 (1936);

Wisconsin Employment Rel. Bd. v. Gateway Glass Co., Inc., 265 Wis. 114, 60 N.W.2d 768 (1953);

Nevada Half Moon Mining Co. v. Combined Metals R. Co., 176 F.2d 73 (10th Cir. 1949);

Kuenzi v. Radloff, 253 Wis. 575, 34 N.W.2d 798 (1948).

In the *Berkal* case, supra, the Supreme Judicial Court of Massachusetts said at page 620 with relation to the construction of a contract,

“So far as reasonably practicable it should be given a construction which will make it a rational business instrument and will effectuate what appears to have been the intention of the parties.”

The Wisconsin Supreme Court in the *Wisconsin Employment Rel. Bd.* case, supra, significantly said at page 770:

“Under recognized rules of interpretation of contracts where one construction would make a contract unusual and extraordinary while another equally consistent with the language used would make it reasonable, just and fair, the latter must prevail.”

In the *Nevada Half Moon Mining* case, supra, the Circuit Court for the 10th Circuit had for consideration upon appeal the question of the application of an agreed percentage figure to certain net mill or smelter returns of the sale of ores. The trial court failed to include in the figure to which the percentage was to be applied, the proceeds of certain premium or subsidy payments of the Metals Reserve Company, a wholly owned agency of the United States. The Appellant contended the percentage should be applied to these payments as well as to the net smelter returns. The Court agreed. The Circuit Court stated at page 75:

“The cold language contained in a written agreement, standing alone, is not always controlling. *General Finance Corp. v. Dillon*, 10th Cir. 172 F. 2d 924. That which is necessarily implied in a contract is as much a part of it as though expressly stated therein, but the implication must result from the language employed in the instrument and be indispensable to carry the intention of the parties into effect. If it is clear from all the pertinent parts or provisions of the contract

taken together and considered in the light of the facts and circumstances surrounding the parties at the time of its execution, that the obligation in question was within the contemplation of the parties, or was necessary to carry their intention into effect, it will be implied and enforced. *Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 47 S.Ct. 368, 71 L.Ed. 663. And a contract should not be so narrowly or technically interpreted as to frustrate its obvious design or so loosely construed as to relieve a party of an obligation or liability fairly within its scope or spirit."

In *Kuenzi v. Radloff*, supra, the question for consideration was a contract by which an engineer was to be compensated on the basis of a percentage of the "estimated value" of a certain project. The defendants insisted that the value should be the market value of the property which was very low rather than the estimated cost value as testified to by the plaintiff. The plaintiff contended that such would lead to an unjust and unusual result. Said the court at page 802:

"It is considered that this case is ruled by *Burroughs v. Joint School District*, 155 Wisc. 426, 144 N.W. 977. It was there held that if when the term 'value' is applied to a particular contract, or conditions growing out of it, it leads to results clearly not contemplated by the contract read as a whole, and it is susceptible of another meaning which harmonizes with all the provisions of the contract, such other meaning should be given to it. * * *"

If, by the simple expedient of classifying "net income" by some other name the Appellants can defeat Appellee's recovery, the Appellee's rights are fleeting indeed. A change in designation cannot alter the essential character of an item. The point is that both parties had contracted on the

basis of a certain percentage of the "net" from operations. They both understood this. They both admitted this in their testimony. There is no dispute about it. Now, it appears that by their manner of classification or by their handling of their inter-corporate affairs the Appellants had arranged it so that Southwest had no income at all of its own. Certainly the parties were not contracting on a basis of 2% of nothing. By the same token, the Appellants had arranged their accounting with United so that the net income of that corporation for one year (1952) was only \$21,000.00 and they would therefore say that the limit of their liability is the agreed percentage of this sum for one year, or the sum of \$435.21. A contract entered into by business men should receive an interpretation that would be in accord with common sense and reasonable business practices.

Classification of business accounts on the books for accounting purposes are as varied as the accountant's imagination and the needs of the party's business. It should not be used as a subterfuge to defeat a recovery to which a litigant is fairly entitled.

IX.

The Findings of the Trial Court Should Be Sustained

It is a familiar rule of Appellate practice that where there is a conflict in the evidence it is the duty of the trial court who has observed the witnesses and listened to the testimony, to appraise all of the facts, and his findings are conclusive where there is substantial evidence to support them (Federal Rules of Civil Procedure, 52 (a) 28 U.S.C.A.).

See: *Carr v. Yokohama Specie Bank*, 200 F.2d 251 (9th Cir. 1952);

Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541 (9th Cir. 1949).

As has already been pointed out under the argument upon particular points involved, there is substantial evidence on the agency question that Smith and Smith alone was the one whom the boards of directors empowered to negotiate the contract and execute it on behalf of the corporation. The trial court so found on this evidence. There was also substantial evidence of apparent authority and the trial court's judgment was in accord with this evidence. Likewise, on the question of whether or not there was a failure of performance, there was substantial evidence in favor of the court's findings in favor of Plaintiff and Appellee; and finally, upon the question of damages the evidence appears to be uncontradicted.

SUMMARY OF ARGUMENT

The Appellee has answered the argument of the Appellants point by point.

It is submitted that a provision in the By-Laws of a corporation for employment "at the pleasure" of the Board, does not permit the Board to remove without cause, where there is a contract for a definite term and that furthermore, where there is the power in the board to amend by-laws, the hiring for a term amounts to such an amendment. For both reasons the contract of employment is valid. Each corporation has the right to amend its By-Laws and that power was in fact exercised from time to time. The Arizona statutes do not circumscribe that power. Only one corporation was organized pursuant to the Co-operative Marketing Act and there was no limitation by way of any "contract period", upon that right to amend by-laws.

The contract was not invalid because it exceeded the term of office of the Board because there is no public policy holding that such a contract is invalid. Furthermore, the con-

tract here was for a term of three years and the term of office of each member is three years. The fact that the Board was set up on a basis of staggered terms is not significant because the facts disclose the members have been by custom re-elected for successive terms until death or retirement.

The Appellee contends that the contract which was signed by Walter Smith, President of both corporations, was expressly authorized and that Smith as agent was expressly authorized. In addition the Appellee contends that the President had apparent authority to sign and that the contract was ratified.

The finding of the trial court that there was no failure of performance and that the Appellee was discharged arbitrarily and without cause, is abundantly supported by the evidence.

Finally, it is pointed out that the parties contracted on the basis of 2% of the net income as ordinarily understood and where, as here, the accounting records of Appellants show part of that income as "net margin" to distinguish it from "taxable income", the plaintiff is entitled to recover on the basis of 2% of all net proceeds because that was the intention, as testified to by both Appellants' witnesses and by Appellee. "Net income", "net proceeds" and "net margin" are synonymous terms in co-operative terminology.

CONCLUSION

It is submitted that the case was fairly and carefully tried and the judgment of the District Court should be affirmed.

Respectfully submitted,

JENNINGS, STROUSS, SALMON & TRASK

O. M. TRASK

619 Title & Trust Building

Phoenix, Arizona

Attorneys for Appellee

No. 14400

IN THE

United States Court of Appeals

For the Ninth Circuit

1954 TERM

UNITED PRODUCERS and
CONSUMERS CO-OPERA-
TIVE, a Corporation, and
SOUTHWEST CO-OPERA-
TIVE WHOLESALE, a Cor-
poration,

Appellants,

vs.

RALPH W. HELD,

Appellee.

Appeal from the United
States District Court for
the District of Arizona

OCT 1 1954
PAUL P. O'BRIEN
CLERK

REPLY BRIEF OF APPELLANTS

SCOVILLE & LINTON

Attorneys for Appellants

TABLE OF CONTENTS

	PAGE
I. Reply to Appellee's Contention that a Contract for a Three-Year Term is not Prohibited by the By-laws.....	1
II. Reply to Appellee's Contention that Employment of a Manager Beyond the Term of the Then Board Members is Not Void.....	7
SUMMARY OF ARGUMENT.....	11
CONCLUSION.....	12

CITATIONS

Cases

	PAGE
Edwards v. Keller, 133 S.W. 2d 823.....	10, 11
Fowler vs. Great So. Tel. Co., 104 La. 751, 29 So. 271.....	3
Hill v. American Cooperative Assoc., 195 La. 590, 197 So. 241 (1940).....	3
Hunter v. Sun Mut. Ins. Co., 26 La. Ann. 13.....	3
Leon Farmers Corp. v. Beaman, 240 S.W. 2d 433.....	11
Olmsted & Gillelen v. Hesla, 24 Ariz. 546, 211 P. 589.....	8
Pima County vs. Grossetta, 54 Ariz. 530, 97 P. 2d 538.....	9
Town of Tempe vs. Corbell, 17 Ariz. 1, 147 P. 745.....	8
Tucson Fed. Sav. & Loan Ass'n v. Aetna Inv. Corp., 74 Ariz. 163, 245 P. 2d 423.....	8, 9

Statutes

	PAGE
Arizona Code Annotated, 1939, Section 49-702.....	4, 5
Arizona Code Annotated, 1939, Section 49-703.....	2
Arizona Code Annotated, 1939, Section 49-704.....	2
Arizona Code Annotated, 1939, Section 49-706.....	2, 7
Arizona Code Annotated, 1939, Section 49-707.....	3
Arizona Code Annotated, 1939, Section 49-708.....	3, 10
Arizona Code Annotated, 1939, Section 49-710.....	5
Arizona Code Annotated, 1939, Section 49-712.....	5
Arizona Code Annotated, 1939, Section 49-713.....	7
Arizona Code Annotated, 1939, Section 49-717.....	6
Arizona Code Annotated, 1939, Section 53-204.....	2

IN THE

United States Court of Appeals

For the Ninth Circuit

1954 TERM

UNITED PRODUCERS and
CONSUMERS CO-OPERA-
TIVE, a Corporation, and
SOUTHWEST CO-OPERA-
TIVE WHOLESALE, a Cor-
poration,

Appellants,

vs.

RALPH W. HELD,

Appellee.

Appeal from the United
States District Court for
the District of Arizona

APPELLANTS' REPLY BRIEF

Appeal from the United States District Court
for the District of Arizona

**Reply to Appellee's Contention That a Contract for
a Three-Year Term Is Not Prohibited by the By-Laws**

Appellee in his brief on this point contends: that the by-laws did not prohibit the employment of a manager; that the recent trend of authority is contrary to holding a contract void if it is in conflict with the by-laws; that the by-laws were nothing more than rules of conduct adopted by the directors or

members for the efficient handling of business affairs; and, lastly, that recent statutes in other jurisdictions provide that, although corporations shall have the power to remove officers, they shall be liable in damages for wrongful removal.

For fear of being repetitious, which we will make every attempt to avoid, we should like to point out to the Court that the Cooperative Marketing Statute of Arizona which has been referred to in both briefs, devotes a great deal of attention to the by-laws of a cooperative marketing corporation. The general corporation law of Arizona merely states under "Grant of Powers," Section 53-204, Arizona Code Annotated, 1939, that the corporation has the power to establish by-laws and make the rules and regulations deemed expedient for the management of its affairs not inconsistent with the law. The Cooperative Marketing Statute, on the other hand, lays great stress upon by-laws; for example, the corporation may admit as members certain persons under the terms and conditions prescribed in its by-laws. Section 49-703, Arizona Code Annotated, 1939.

It is provided in the next section that the property rights of the members shall not be altered, amended or appealed except by the written consent or vote of three-fourths of the members qualified to vote under the by-laws of the association. Section 49-704, Arizona Code Annotated, 1939.

The most important section, Section 49-706, Arizona Code Annotated, 1939, states, as we previously set forth in Appellants' Brief, that each association within thirty days after its incorporation *shall* adopt by-laws and that a majority vote of the members, or their written assent, is necessary to adopt such by-laws, and sets forth many things that the by-laws may provide for, including duties and terms of office of directors and officers. The last paragraph of this section, Section 49-706 Arizona Code Annotated, 1939, states that at the termination of each contract period, the association may renew or revise the by-laws to be

in effect for the next contract period, and after such renewal or revision, the by-laws *shall* be the by-laws of the association unless objections are made thereto by fifty per cent of the members.

Section 49-707, Arizona Code Annotated, 1939, sets forth that the by-laws shall provide for one or more regular meetings and sets forth how the meetings are to be called, stating that the by-laws may require such notice to be given by publication in a newspaper.

Section 49-708, Arizona Code Annotated, 1939, provides that the by-laws may provide the manner in which the directors are to be elected, and how vacancies may be filled.

Thus, the Cooperative Marketing Act of Arizona deals with the by-laws of the association to a greater extent than it does with the Articles of Incorporation, indicating that, contrary to Appellee's contention, the by-laws are not mere rules of conduct adopted by the directors or the members themselves for the efficient handling of the business affairs of the corporation. (p. 10—Appellee's Brief.)

The cases cited by Appellee under Part I of his argument relating to this question all deal with cases where the board of directors had the unquestioned power to amend the by-laws. In the case of *Hill v. American Cooperative Assoc.*, 195 La. 590, 197 So. 241 (1940), cited by Appellee on page 10 of his Brief, the Court points out that the defendant in that case cited the case of *Hunter v. Sun Mut. Ins. Co. of New Orleans*, 26 La. Ann. 13, and *Fowler vs. Great So. Tel. Co.*, 104 La. 751, 29 So. 271, and of these cases and the defendant's contention in the instant case, the Court said:

"The cited cases are not pertinent because in those cases the board of directors did not have authority to alter the by-laws adopted by the stockholders."

We submit that the public policy of the State of Arizona, as set forth in the Cooperative Marketing Statute and the Statute itself, limits the right of the board of directors to amend the by-laws. We cannot help but repeat the requirement for the adoption of by-laws as is set forth in the Arizona Statute, which provides that the by-laws *must* be adopted by a majority of the members or their written assent. This is certainly contrary to the usual corporate practice wherein the board of directors alone adopts the by-laws. The reason for the distinction is to us obvious in that a cooperative association made up of members is a non-profit corporation, strictly for the benefit of its members and the directors have no greater powers than do the elective officials of a municipal corporation, for it is their purpose and duty to serve the members. It is not a profit-making organization.

Appellee contends that Southwest Co-Operative Wholesale is not a cooperative marketing association, and points out one section of the Cooperative Marketing Act which states that five or more persons engaged in the production of agricultural products *may* form a non-profit cooperative association without capital stock. Thus, Appellee contends that since there is stock set up in Southwest Co-Operative Wholesale, it is not a cooperative under the Arizona Act.

Let us look further at the Articles of Incorporation of Southwest Co-Operative Wholesale (Defendants' G in evidence) which recite the purpose for which the corporation is organized in Article II. Section (1) of Article II is practically verbatim with the second paragraph of Section 49-702, Arizona Code Annotated, 1939, setting forth the powers of a cooperative marketing association. All of the sections under Article II deal with cooperative purposes. Particularly note Section (10) of Article II, whereby they have the power to enter into contracts with farmers and agricultural producers for the handling, preparing for market and marketing.

Referring to Section 49-702, Arizona Code Annotated, 1939, the statute reads in part as follows:

"To acquire and to hold, own and exercise all rights of ownership in, and to sell, transfer, or pledge shares of *the* capital stock or bonds . . ." (Emphasis ours.)

Also a portion of the same statute reads:

"To establish reserves and to invest the funds thereof in stocks and bonds of any corporation or association engaged in any related activity, or in the handling, marketing, processing or financing of the products handled by the association . . ."

And then the last paragraph of the aforesaid section states:

"To possess the powers, right and privileges of corporations organized under the general laws of the state, unless inconsistent herewith."

Section 49-710, Arizona Code Annotated, 1939, states as follows:

"When a member of an association established without capital stock, has paid his membership fee, he may receive a certificate of membership. Members shall not be liable for the debts of the association above the sum remaining unpaid on their membership fees. No member shall be entitled to more than one (1) vote."

This section would indicate that if there is no stock, the member is to receive a certificate of membership; corollary, of course, if there is stock, he would receive stock.

The most important section which begins to spell out the entire purpose and recitation of the fact that there can be stock or memberships in a cooperative marketing association is Section 49-712, Arizona Code Annotated, 1939, under Referendum, which states as follows:

"Upon demand of one-half of the entire board of directors, any matter that has been approved or passed by the board must be referred to the membership or the stockholders for decision at the next special or regular meeting."

In concluding this matter, Section 49-717, Arizona Code Annotated, 1939, states as follows:

"An association organized hereunder may organize, form, operate, own, control, have an interest in, own stock of, or be a member of any other corporation, with or without capital stock, engaged in processing, handling, utilizing, manufacturing, marketing, financing or selling of the agricultural products handled by the association, or the by-products thereof. Profits or income received from the foregoing investments may be added to the reserves of the association, to be distributed or handled according to the discretion of the board of directors. It may enter into contracts and arrangements with any other cooperative corporation, or association, formed in this or in any other state, for the cooperative and more economical carrying on of its business, or any part thereof. Any two (2) or more associations may, by agreement between them, unite in employing and using the same methods, means and agencies for carrying on and conducting their businesses."

This indicates that the association or corporation organized under this Act may own stock or be a member of any other corporation, with or without capital stock, engaged in the same type of business.

Thus, we see in view of the Articles of Incorporation of Southwest Co-Operative Wholesale and the statutes above referred to that Southwest Co-Operative Wholesale is controlled by and operating under the Cooperative Marketing Act of Arizona. It is true that the Articles of Incorporation do not specifically state that it is organized under that Section. If, however, the Articles of Incorporation and the activities of the corporation are such that, we contend, it certainly is a cooperative association. If Southwest is not a cooperative marketing association, and therefore the same impediment as to the amend-

ment of the by-laws does not apply, the record shows that the margin of United was greater than the margin of Southwest (Plaintiff's Exhibit 9) and, since the by-laws did not allow this type of contract for United, United should not be penalized, and some determination would have to be made as to what percentage Southwest would be forced to pay if the Plaintiff was successful in all of his other arguments and unsuccessful in this one.

The Appellee further contends that the contract period referred to in Section 49-706, Arizona Code Annotated, 1939, relates only to a marketing contract set forth in Section 49-713, Arizona Code Annotated, 1939. In this we cannot agree. It is well known that there are several types of cooperatives, strictly speaking. One is an organization whereby members get the benefit of increased purchasing power and savings by cooperating together through one association. Certainly a considerable portion of United's business was this type of cooperative. Thus, the contract referred to in the record (pp. 190-191) is that type of a contract which extends specifically for one year. Therefore, it is the contention of Appellants that the by-laws could not be changed in the interim. It appears that it is just as important that the by-laws in that type of a marketing contract be constant and subject to the scrutiny and control of the members as in any other type of cooperative arrangement.

Thus, it is the contention of Appellants that the by-laws were more than mere rules of conduct and it has been conclusively shown that the Plaintiff-Appellee had knowledge that the by-laws provided that he hold office at the pleasure of the board of directors.

II.

Reply to Appellee's Contention That Employment of a Manager Beyond the Term of the Then Board Members Is Not Void.

Appellee attempts to pass over the Arizona case cited by Appellant, *Tucson Fed. Sav. & Loan Ass'n v. Aetna Inv. Corp.*, 74 Ariz. 163, 245 P. 2d 423, with the mere statement that that case holds that employment contracts were not in point in the issue before the Arizona court.

Let us examine the history of Arizona cases dealing with this subject. These cases deal with municipal corporations.

The first of such cases in the case of *Town of Tempe vs. Corbell*, 17 Ariz. 1, 147 P. 745. In that case, the town Council had attempted to employ a party as a street sprinkler for a period beyond the term of the Council and the Court in that case, after stating that the general rule is that a contract made by the commissioners in good faith is ordinarily a valid contract, stated as follows:

"A well-recognized exception to the rule exists applicable to contracts in reference to matters which are personal to the board in their nature, and the contract limits the power of the succeeding members to exercise a discretion in the performance of a duty owing to the public. This exception to the rule is based upon the grounds of public policy."

The next Arizona case on the subject arose in 1922 in the case of *Olmsted & Gillelen v. Hesla*, 24 Ariz. 546, 211 P. 589. In this case, there was a contract of employment of engineers for the County Highway Commission under a bond issue. The terms of the Highway Commissioners expired three months after the date of the contract; however, the construction could not be completed in less than three years. The Court, after stating that although the Commissioners themselves might not have the professional skill and knowledge to do some of the work they were nevertheless responsible to the County for the work, stated:

"Since that must be true, we think the commission that is in office while construction or improvement is being done should

be allowed to select its own employees and servants, and that such is the intent and policy of the road improvement acts. Otherwise an incoming commission might be burdened with a corps of employees and servants unwilling or unfit to do the work, yet made responsible for their acts in connection with the work in hand."

Perhaps the clearest statement is set forth in the case of *Pima County vs. Grossetta*, 54 Ariz., 530, 97 P. 2d 538, and in this case, the Board of Supervisors in Pima County had hired three groups of practicing attorneys to do three things: first, to sue to recover a jury fee judgment; second, to prosecute a certain civil case in which the County was interested; and third, to sue a local bank for taxes the County believed to be due. Concerning this, the Court stated the rule as follows:

"The first is whether the contracts were ultra vires for the reason that they extended beyond the term of the existing board of supervisors and that of the county attorney who consented thereto. We have had a similar question under consideration in *Town of Tempe v. Corbell*, 17 Ariz. 1, 147 P. 745, L.R.A. 1915E, 581, and *Olmsted & Gillelen v. Hesla*, 24 Ariz. 546, 211 P. 589. At first glance it might seem that the opinions therein supported the objection under consideration, but a careful examination will show that the true rule laid down may be stated as follows: Where the contract in question is a unitary one for the doing of a particular and specified act, but its performance may extend beyond the term of the officers making it, if it appears that the contract was made in good faith and in the public interest it is not void because it will not be completed during the term of those officers. *If, on the other hand, the contract is for the performance of personal or professional services for the employing officers, their successors must be allowed to choose for themselves those persons on whose honesty, skill and ability they must rely.*" (Emphasis ours.)

Thus the rule that Appellee refers to as dicta in *Tucson Fed. Sav. & Loan Ass'n. v. Aetna Inv. Corp.*, supra, is not new in this jurisdiction. In the case before the Court, the contract was for

the services of a general manager. Section 49-708, Arizona Code Annotated, 1939, states in part as follows:

"The affairs of the association shall be managed by the board of directors, elected by the members from their number."

In this direction of the Statute, it states that the affairs shall be managed by the directors. Thus, the directors are personally responsible for the management. Therefore, they can not turn over control to a third party, as was done in this case. Certainly the hiring and firing of *all* persons needed to carry on the affairs of the business is an integral part of the management of the affairs of the business, and this was given by the board to Held, and was to extend beyond the terms of all of the then board members of both corporation.

We submit, therefore, that under the authority previously cited and under the analogous authority of Arizona Courts in previous cases, this contract was absolutely void for the reason that it extended beyond the term of the then directors. In this regard, we should like to point out that although we are not specifically setting up a heading in answer to other parts of Appellee's Brief, this reasoning makes us feel that our argument previously advanced as to the necessities and desirability of Walmsley's supervision in working out the terms was something that the Board bargained for in view of the fact that Walmsley, upon questioning of Appellee, stated that he would not have agreed to a contract for a three-year term.

Appellee attempts to belittle the case of *Edwards v. Keller*, 133 SW 2d 823 (p. 22 Appellants' Brief) by saying that the case is not in point because it is under a Texas statute. That particular Texas statute merely provided for the election of directors annually at the annual meeting of the stockholders. Our statute provides that the by-laws shall set forth the terms of office of the directors, and the by-laws of United provide that the directors

shall be elected at the regular annual meeting, and the by-laws of Southwest provide for a three-year election and set forth the usual staggered term provision. Thus, the Texas Statute upon which Appellee lays so much stress to get around the decision in that case, is merely that directors are elected for specific terms, which is true in this case also.

The *Edwards vs. Keller* case, *supra*, holding was followed in the more recent case of *Leon Farms Corp. v. Beaman*, 240 SW 2d 433.

Summary of Argument

Appellants have replied to argument of Appellee as to the vital points of the issues on appeal. We feel that the previous argument on the other points amply sets forth the issues of both parties and, because of the time and space limitation, we have devoted no further argument to those points.

It is respectfully submitted by Appellants that this contract is void on two basic principles:

First, that the board of directors did not have authority to enter into the contract. This is prefaced upon the Statute of Arizona, the public policy of the State, and the fact that the Plaintiff-Appellee had personal knowledge of the prohibitions.

Second, that the contract is void, inasmuch as it was a contract for services that should have been performed by the board members and that it tied the hands of subsequent boards. The contract, therefore, is against public policy and contrary to decisions of the State of Arizona.

It is the further contention, as set forth in Appellants' opening brief, that the terms of the resolutions required Smith and Walm-

sley to employ plaintiff and that Walmsley did not sign the agreement and would not have agreed to the terms.

It is the further contention, as previously set forth, that "net income" does not mean "net margin," a fact well known by Plaintiff-Appellee.

Conclusion

It is submitted that the judgment of the District Court should be vacated and reversed, with direction to enter judgment for the Defendants, as prayed.

Respectfully submitted:

SCOVILLE & LINTON

By WALTER LINTON
219 Heard Building
Phoenix, Arizona
Attorneys for Appellants



